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Thomas F. Torrance

THE LAW OF CREEDS IN SCOTLAND

THE LAW OF CREEDS IN SCOTLAND

A TREATISE

ON

THE RELATIONS OF CHURCHES IN SCOTLAND
ESTABLISHED AND NOT ESTABLISHED
TO THE CIVIL LAW

BY

A. TAYLOR INNES

ADVOCATE

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EDINBURGH AND LONDON
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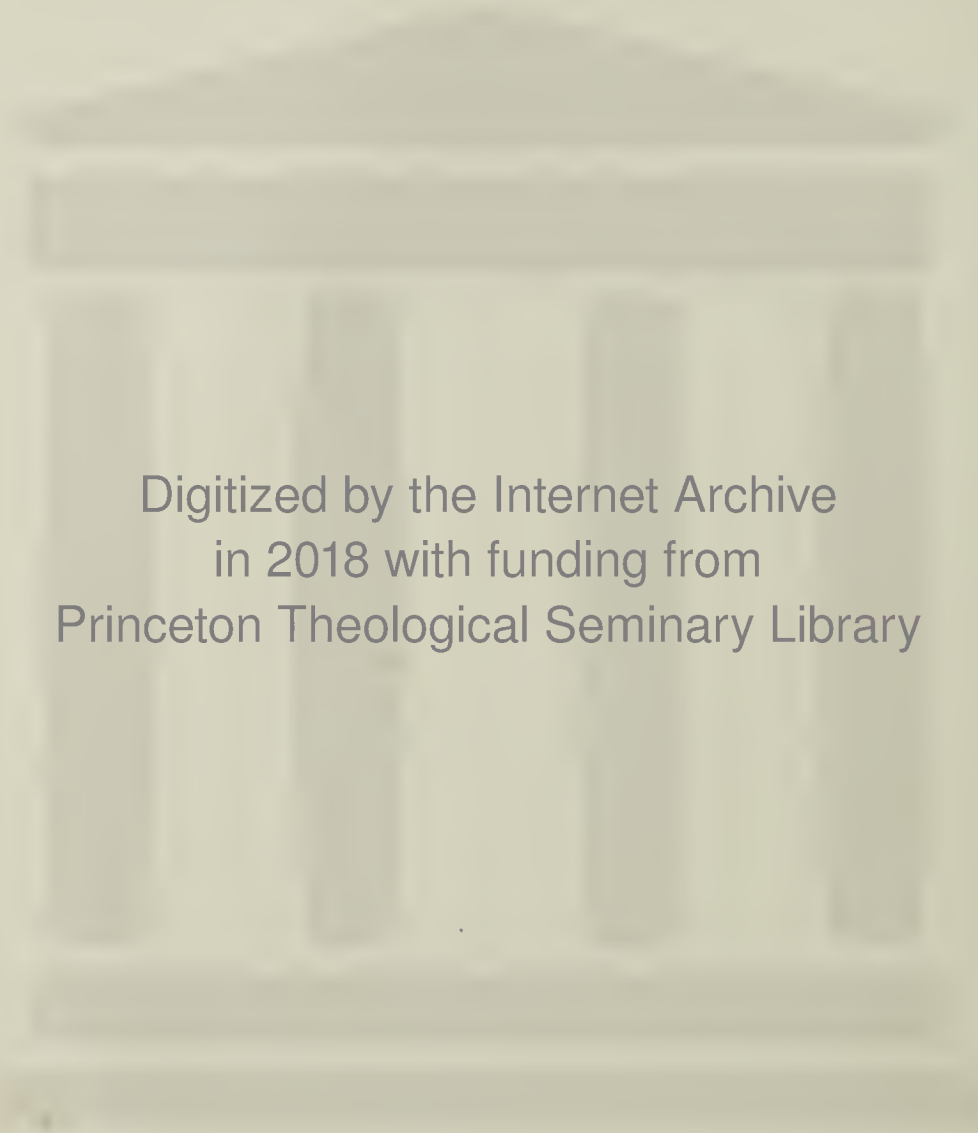

PREFACE.

THIS is not a book of Church law. It does not profess, that is, to give the internal or administrative law of any Church, as to its creed or otherwise. It is a book of the civil law of Scotland in its relation to the Church.

In the present form its scope has been enlarged so as to embrace the whole relation of our jurisprudence to Churches as bodies, whether within or without establishment. It thus includes that solid block of constitutional decisions which before 1843 dealt with the Church's claim to independence within establishment, and fixed its relation to statute and the State. But it records too how the Courts, beginning in the eighteenth century with an attempt to ignore the Church outside, have been obliged to deal with it also, in connection with questions of reparation and questions of property, and on principles which are by no means yet settled. On both sides the question of creed

and creed revision is kept in view; and I have now added the law for thirty-five years since the last great House of Lords case in 1867.

This book was among the first to point out that even in free countries law has necessarily to deal with Churches, and therefore with their principles and creed. In so dealing it finds difficulties on two sides. On the one hand, men aspire age after age after a truth unchangeable and divine, to which even their consciences may cling. And law, when dealing with those united around such a centre, has to handle the very heart of things, and can only do it in an external way. But on the other hand, while truth is divine, men change in their vision and utterance of it; and law finds that the conscience of the sons does not stand exactly where that of the fathers did. Thirty years ago Mr Gladstone, discussing with passionate eloquence the problems raised in the first issue of this book, said to me, "The truth is, the law will never be right till it makes a distinction between a man's principles and his opinions." It is a true and even a profound distinction. But the difficulty of applying it (largely illustrated in the speaker's own history) returns in so many forms when law deals with the principles, and the limits of deviation, of a Church, that the final demarcation will be a triumph of jurisprudence.

Readers abroad may desire to know how the law of one small European people has dealt with this matter. Those at home will be more interested in the steps by which the question has reached the critical point where it stands in Scotland, both within and without establishment, at the present moment.

A. TAYLOR INNES.

EDINBURGH, *May* 1902.

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BOOK I.

THE CHURCH WITHIN ESTABLISHMENT

CHAPTER I.

THE REFORMATION AND THE REVOLUTION.

THERE are many reasons why the law of Scottish Churches and their creeds should be looked at, in the first instance, historically.

The Confession framed at Westminster was not the original creed of the Scottish Church. Our native creed is the Scottish Confession, which appears in the creeds of the Reformation, of date 1560, when it was drawn up by John Knox and his compeers. And the Westminster Confession, which succeeded it, and which only became the law of the land by the statute of 1690, was made the law of the Church forty-three years earlier, by an Act of Assembly — an Act, too, by which the Confession was adopted under certain explanations and conditions, which the statute presently binding the Church has rejected or ignored. These circumstances remind us that our subject has a close connection with that three hundred years' debate between statesmen and men of the Church, on the point of ecclesiastical independence, which forms so great a part of the history of Scotland. And before we arrive at the second portion of our volume, and inquire into the legal relations of Churches not established to the creeds which they have voluntarily taken up, we shall be called upon to consider whether the attitude of the historical Church party in times past throws any light upon their present relation to their creed, now that the final decision of 1843 has rooted them out of the Establishment. The matter will be found to need all the illustration from the

past it can receive. The question how far the Established Church is tied to its creed is simple, compared with the question how far the Free Church, or the United Presbyterian Church, or the resulting United Free Church, is so tied. Nor is the question peculiar to those Presbyterian bodies which claim to stand on the ground of Church independence mapped out for them by Andrew Melville, and which the bitter Voluntary controversy of the earlier part of last century kept apart, although its closing months, in the kindly irony of Providence, have incorporated them into one body. It applies specially to bodies such as the Scottish Episcopal Church, and to all who cherish the idea of Church authority and jurisdiction. How far, at common law, can they deviate from their present customs and ordinances, discipline and worship—how far, in particular, can they vary their creed? The question comes up when civil rights are involved; and the tenures of churches and the execution of trusts make it necessary for law to give an answer. The rule of law is, that the property shall follow the principles to which it is devoted, and the court will prevent its being diverted: but what if one of these principles be that the Church shall have a right to *change* its constitution or improve its creed? In collecting and collating the series of judicial decisions on this point, and in indicating what the authoritative documents of the Scottish Churches are, it will be found an advantage to have gone over first the ancient ground where almost all of these bodies find a common origin.

THE CREED of Scotland and the Church of Scotland emerge into history so nearly at the same moment,[1] that

[1] Whatever the Christian or the statesman may do, it does not seem practicable for the lawyer to go farther back than the Reformation in dealing with the history of the Scottish Church. The Scottish Reformers, indeed, like nearly all others in Europe, acknowledged Roman Catholic baptism as valid; and this seems, on their own principles, to imply a visible Church of some kind previously subsisting in the country.

it is difficult to say which has precedence even in order of time. It is at least equally difficult to say which is first in respect of authority; and, indeed, the question whether the Church is founded upon the creed or the creed upon the Church, appears to be at the root of most of the legal difficulties that lie before us.

So, too, the statute introducing the Scottish Confession abolishes many Acts of Parliament in the reigns of the first five Jameses, as having given occasion to the maintenance of "idolatry and superstition *within the Kirk of God*, and repressing of such persons as were professors of God's holy Word, wherethrough divers innocents did suffer;" and the phrase of the times, a "Re-formation" of religion, or a new "face" of religion, might carry a similar interpretation. (Knox, in a well-known and eloquent passage of his History, declares the object of all his efforts to have been, "That the reverend face of the primitive and apostolic Kirk should be reduced again to the eyes and knowledge of men.") But, on the other hand, the Acts declaring the new Church of "the blessed Evangel" to be the "only true and holy Church of Christ within the realm" (1567); and again, that there is "*no other* face of Church nor other face of religion than is presently by the favour of God established within this realm" (1579), are very express. No doubt this must not be pushed too far; for the "Church of the Evangel" held communion with the other Churches of the Reformation, whose doctrine and discipline, though similar, were not identical with its own; and our later legislation expresses this. A question might therefore conceivably be raised whether, now that the Revolution Settlement and the doctrine of toleration have intervened, these ancient statutes wholly exclude from the recognition of our law Dissenting Churches similar in doctrine to the Church of Scotland, or differing from it only in such a point as the practice of a moderate Episcopacy. But there can be no question as to the deadly opposition between all our statute-law since the Reformation, whether of an earlier or later date, and the Higher Church doctrine which would make either Episcopacy, or what the Scottish Confession calls "lineal descence," *essential* to a Church of Christ; and, of course, between it and that absolute and centralised form of the doctrine embodied in the Church of Rome. So, while the Reformation statutes ignore any previous Church of Scotland, they do not ignore but denounce the visible Catholic Church of Rome; and throughout our law the relation between the "Kirk" acknowledged before 1560 and that acknowledged after, is one of the sharpest contrast. In the Scottish Confession (1560) the Romish Church is alluded to very unmistakably as "the Church malignant;" while even that of Westminster, after declaring that some Churches have so degenerated as to become mere synagogues of Satan, pronounces the Pope to be Antichrist. (See on this subject Lord Medwyn's speech in the case of Cuninghame *v.* The Presbytery of Irvine; Report of the Stewarton case, p. 17.) We

The Church of Scotland was recognised or established by the State in 1567; but the Scottish Confession of Faith dates from 1560, in which year also the first General Assembly was held. For the origin of the Reformed Church, however, we have to go back several years earlier, to the December of 1557, when the leading men of the new persuasion signed what was called the "First Covenant," or common bond. The subscribers to this document, on a preface of attacks being made upon "the Evangel of Christ and His congregation," promise "before the majesty of God and His congregation," to maintain, nourish, and defend "the whole congregation of Christ, and every member thereof," to the death; "unto the which holy Word and congregation we do join us, and also do renounce and forsake the congregation of Satan, with all the super-

can therefore derive no advantage in our inquiries from the Pre-Reformation statutes as to "the libertie of Holy Kirk" (1424, c. 1; 1424, c. 26; 1443, c. 7; 1466, c. 1; 1489, c. 7; 1515, c. 1; 1535, c. 9; 1535, c. 36; 1551, c. 7; 1551, c. 18); for the external or visible institute that is meant by the Kirk in all these is rejected by succeeding legislation in the most violent way. (The Statute 1571, c. 35, it must be admitted, reads ambiguously.)

How the Reformers speak of a Church (invisible) in Scotland before the Reformation may be gathered from the following extract from the Harmony of the Protestant Confessions, where (in the year 1581) the Churches of France and Belgia comment on a statement by the sister Church of Bohemia. (It will be remembered that the "doctrine of the Reformed Churches" is imported into our law by the Act 1690, c. 5; and that our Scottish Confessions are rather more strongly anti-Romanist than those uttered abroad.) There are places, they say, where "it cannot safely be affirmed that the visible Church of Christ is to be seen, or is at all. And yet, notwithstanding, there is no doubt to be made, but some secret true members of Christ, and such as (it may be) are only known to God, be there hid; and therefore that there is a Church even in Popery, as it were, overwhelmed and drowned; whence God will fetch out His elect, and gather them to the visible Churches that are restored and *reformed*, whereas Popery never was, nor is, a true Church."—Harmony of Protestant Confessions, translated from the Latin: London, 1842.

Whether, theologically, they were not bound also to have acknowledged a Church *visible* within, or in some way connected with, the old Romish Church, it is unnecessary to inquire. The legislation which we are about to trace is pure from any such admission.

stitious abominations and idolatries thereof." Henceforth the name Congregation[1] (by no means a worse rendering of the Scriptural *ecclesia* than the subsequent κυριακόν or kirk) was the distinctive name of those who held themselves to be the only "professors of the religion" or "of the truth" in Scotland; and their leaders are known in history as the "Lords of the Congregation." The first thing they did after being thus associated was to pass a remarkable ordinance as to the order of worship "in all the parishes of this realm," the much greater part of which was still Romish, so that the ordinance took no effect out of their own particular territories. And a year after they protested to the Queen Regent (Mary of Guise) and Parliament, "Seeing we cannot obtain ane just Reformation, according to God's Word, that it be lawful to us *to use ourselves* in matters of religion and conscience, as we must answer unto God, unto such time as our adversaries be able to prove themselves the true ministers of Christ's Church"—a prayer to "God's lieutenant" for what they call "indifference," which is rare in Scottish history, and which the Queen Regent was at that time disposed to grant. Knox, looking back on this early time, says, "We offered due obedience to the authority, requiring nothing but the liberty of conscience, and our religion and fact to be tried by the Word of God."[2] For a whole twelvemonth, indeed, there was a chance that Scotland and its Protestants might have the same experience as the primitive Church had in the Roman empire, ere yet the toleration of Constantine was succeeded by the establishment of Theodosius.[3] But next year, 1559, a rupture took place, and the hope of toleration all round fled. Other bonds followed. Yet there is no record

[1] "The visible Church of Christ is a congregation of faithful men." —Nineteenth Article of the Church of England.

[2] Knox, i. 313. References in this work are to Laing's edition, in six volumes.

[3] See the ancient crisis summarised in the author's "Historical Manual" (of Church and State), p. 31.

of any formal approval of any Confession until the death of the Queen Regent, and the calling of the Parliament of 1560, brought the nation to the great crisis of its history.[1]

The Parliament of 1560—by far the most important which has ever sat in Scotland—contained a "great assembly,"[2] chiefly of the lesser barons; but being without royal authority, its legality was always impugned, and required the express ratification of a subsequent Act (the third of the first Parliament of James I., 1567). We are by it thrown back to 1560, and to the great document of that year, which is described in our Statute-book, in words every clause of which deserves to be carefully weighed, as "The Confession of the Faith and Doctrines believed and professed by the Protestants of Scotland, exhibited to the Estates of the same in Parliament, and by their public votes authorised as a doctrine grounded upon the infallible Word of God." The history of the transaction, in so far as it has been preserved, seems in accordance with each part of this terse description. A "Supplication" was presented to the Estates from "the barons, gentlemen, burgesses, and others, subjects of this realm, professing the Lord Jesus within the same," the first prayer of which was the abolishing of "such doctrine and idolatry as by God's Word are both condemned;" and in response to this "were the barons and ministers called

[1] Indeed, while the Church was in the state long after described by Knox, "when as yet there was no public face of a Kirk, nor open assemblies, but secret and privie conventions in houses or in the fields," public adoption of a Confession was hardly to be expected. If formally adopted at all then, it must have been for local purposes, as elders and deacons were carefully and formally appointed. — Knox, ii. 151. And whatever was the case afterwards, the "gude and godly ballate" entitled 'The wind blaws cauld,' in all probability gives the true account of the confession of its authors in the earliest times—

> "Wha does present the New Testament,
> *Which is our faith* surely,
> Priests calls him like ane heretick,
> And says, 'Burnt shall he be.'"

[2] Knox.—The names of those who sat in it are to be found in Bishop Keith's History, i. 311.

and commandment given unto them, to draw in plain and several heads the sum of that doctrine which they would maintain, and would desire that present Parliament to establish as wholesome, true, and only necessary to be believed within the realm: which they willingly accepted, and in four days presented this Confession," says Knox, who undoubtedly was its principal author. Yet either within this short period, or immediately after, it was subjected to at least one revision. "This our Confession," says Knox (for it was the Confession of the "Protestants within the realm of Scotland," presented to the Estates, and might have been rejected by the latter instead of being accepted), "was publicly read, first in audience of the Lords of the Articles, and *after* in audience of the haill Parliament." Randolph, the envoy in Edinburgh of Queen Elizabeth, informs us that, "before it was published or many words spoken of it, it was presented unto certain of the Lords to see their judgments. It was committed unto the Laird of Lydington [Lethington] and the sub-prior to be examined." Maitland of Lethington, an able statesman, and afterwards as Secretary of State the clear-headed opponent of Knox, was speaker of this Parliament, which he had opened with a "harangue;" and the remit to him and Wynram, the sub-prior of the Augustinian convent at St Andrews, was doubtless made by their brethren, the other Lords of the Articles. Whether their revision resulted in the suppressing of a whole chapter on the duty of obeying or disobeying magistrates (Mr Tytler alleges this), seems very doubtful; but as Randolph, in a most interesting letter quoted below, positively states that, without interfering with the doctrine, they "mitigated the austerity of many words and sentences,"[1] it is probable that the alterations on

[1] "If my poore advice myght have bene harde touching the Confession of the Faythe, yt sholde not so soone have come into the lyghte. God hathe sent it better success for the confirmation thereof then was looked for. It passed men's expectatione to see it passed in such sorte as yt

this particular portion were considerable. Knox says nothing of this whole matter of revision, merely saying that within four days from the time the commission was given, they (the barons and ministers) "presented the Confession as it followeth without alteration of any one sentence."

The account of this public reading, "in audience of Parliament," on Saturday the 17th August 1560, is exceedingly interesting; and the graphic description which follows, given by the chief actor in the scene, is now countersigned by the publication of the private letters of the sagacious English envoy:—

This our Confession was publicly read, first in audience of the Lords of the Articles, and after in audience of the whole Parliament, where were present, not only such as professed Christ Jesus, but also a great number of the adversaries of our religion, such as the forenamed bishops, and some others of the temporal Estate, who were commanded in God's name to object, if they could, anything against that doctrine. Some of our ministers were present, standing upon their feet, ready to have answered, in case any would have defended the Papistry, and impugned our affirmatives: but seeing that no objection was made, there was a day appointed to voting in that and other heads. Our Confession was read every article by itself over again, as they were written in order, and the votes of every man were required accordingly. Of the temporal Estate only voted in the contrary, the Earl of Athole, the Lords Somerville and Borthwick; and yet for their disassenting they produced no better reason, but, "We will believe as our fathers believed." The bishops (Papistical we mean) spake nothing. The rest of the whole three Estates, by their public votes,

---

dyd. Before that yt was published, or maynie wordis spoken of yt, yt was presented unto certayne of the Lords to see their judgements. It was commytted unto the Laird of Lydington and the sub-prior to be examined. Thought theie coulde not reprove the doctrine, yet dyd theie mitigate the austeritie of maynie words and sentences which sounded to proceede reather of some evil conceaved opinion, then of anie sounde judgement. The autor of thys worke had also put in this treatie a tytle or chapitar of the obediens or dysobediens that subjects owe unto ther magistrates. It contayned lyttle les matter in fewe wordes then hathe bene otherwyse written more at large. The surveyors of thys worke thought it to be an unfit matter to be intreated at thys tyme, and so gave their advice to leave it owte."—Knox's Works, vi. 120, 121.

affirmed the doctrine; and many the rather because that the bishops would nor durst say nothing in the contrary; for this was the vote of the Earl Marschall: "It is long since I have had some favour unto the truth, and since I had a suspicion of the Papistical religion; but I praise my God, this day has fully resolved me, in the one and in the other; for seeing that my lords bishops, who for their learning can, and for that zeal they should bear to the verity, would (as I suppose) gainsay anything that directly repugns to the verity of God; seeing, I say, my lords bishops here present speak nothing in the contrary of the doctrine proponed, I cannot but hold it to be the very truth of God, and the contrary to be deceivable doctrine. And therefore, in so far as in me lieth, I approve the one and damn the other: and do farther ask of God, that not only I, but also all my posterity, may enjoy the comfort of the doctrine that this day our ears have heard. And yet more, I must vote as it were by way of protestation, that if any persons ecclesiastical shall after this oppose themselves to this our Confession, that they have no place nor credit, considering that they having long advisement, and full knowledge of this our Confession, none is now found in lawful, free, and quiet Parliament to oppose themselves to that which we profess: and therefore, if any *of this generation* pretend to do it after this, I protest he be repute rather one that loveth his own commodity, and the glory of the world, than the truth of God, and the salvation of men's souls."[1]

Nothing can be clearer than that the doctrine was not supposed to be adopted upon the *authority* of the new-born or Reformed Church. Knox and his compeers were present to support their supplication; the bishops, in their place in Parliament, were invited to impugn the articles proposed; and all the forms of a free and deliberate voting of the doctrine *as truth*—as the creed of the Estates, not of the Church—were gone through. But indeed not only were the relations of the civil magistrate *to the Church* in Scotland postponed and subordinated to the more immediate claims and more absolute authority of "truth" ("God's truth" — "the religion" — "doctrine grounded upon the infallible truth of God's Word"): but at this early stage these relations were almost wholly ignored, even in the Confession itself, while the magistrate's relation *to truth* is made most emphatic and express. "Moreover, to

[1] Knox, ii. 121.

kings, princes, rulers, and magistrates, we affirm that, chiefly and most principally, the conservation and purgation of the religion appertains; so that not only they are appointed for civil policy, but also for maintenance of the true religion, and for suppressing of idolatry and superstition whatsoever."[1] "The religion" in every case comes first; and the allusions to the Church are either incidental or come in by way of inference and deduction. This precedence given to truth above all things, and to doctrine which is the form of truth, comes out in the whole legislation of Scotland, and is not wanting in the three Acts passed in 1560, exactly a week after the Confession was ratified—Acts which were all re-enacted in 1567.[2] The legislation of 1560, it must be remembered, does not directly establish the Kirk, except in the sense of abolishing and penalising the Kirk which had preceded it. But by the first of these the jurisdiction of the "Bishop of Rome, called the Pope," was abolished, on the ground that it had been "not only contumelious to the Eternal God, but very hurtful and prejudicial to our sovereign authority and commonwealth of this realm."[3] By the second, all Acts of Parliament "made in times bypast not agreeing with God's Word, and now contrary to the Confession of Faith, according to the said Word, published in this Parliament," were annulled, the reasons given in the preamble being their opposition to "God's Word," and that men had taken occasion by them of "maintenance of

[1] Scottish Confession, c. 24.

[2] These Acts, passed on 24th Aug. 1560, were formally repeated or re-enacted in 1567. The ratification of the Confession was never repeated, but is constantly founded upon in subsequent Acts. The minutes of Parliament, of 17th August 1560, embody the whole Confession, with the addition, "Thir Acts and Articles are red in the face of Parliament, and ratefyit be the three Estates of the realme, at Edinburgh, the 17 day of August the year of God 1560 yearis."

The Scottish Confession is to be found in Knox's History, Calderwood's History of the Church of Scotland, Dunlop's Collection of Confessions, Edward Irving's reprint, Dr Schaff's Creeds of Protestant Churches, and (translated into Latin) in Niemeyer's Collectio Confessionum.

[3] Act 1567, c. 2.

idolatry and superstition in the Kirk of God, wherethrough divers innocents did suffer."[1] By the third, on the ground that "God and His holy Word" had made the true use of the sacraments "notour and perfectly known," and yet that, "notwithstanding the reformation already made according to God's Word," some of the Papistical Kirk and their ministers stubbornly persevered in celebrating the mass, such "idolatry" was made penal, the third lapse into it to be punished with death.[2] It is the second of these Acts into which the Confession is incorporated in our published Statute-books. After being twice referred to in conjunction with God's Word, it is added, "of which Confession of the Faith the tenour follows;" and then are inserted the twenty-five chapters, some of which we give in full (with the titles and order of the whole Confession), in the appendix to this Book.[3]

From 1560, after the death of the Regent, Mary of Guise, to 1567 and the abdication of Mary Queen of Scots, matters continued in the same state. The one circumstance that prevented the great doctrinal revolution being carried into effect by an establishment of the Church, was the arrival, in 1561, of a young, beautiful, and strong-willed queen, who

[1] Act 1567, c. 3.

[2] Some Acts passed during the remainder of the century may here be enumerated as bearing remotely on the subject of this volume, and not specially referred to in subsequent pages, viz.:—1567, c. 11, "That teachers of youth should be tried by the visitors of the Kirk;" 1567, c. 14; 1557, c. 15; 1572, c. 53, "Excommunicate persons should be denounced rebels;" 1573, c. 55, declaring divorce for desertion competent, "since the true and Christian religion was publicly preached, avowed, and established within this realm, namely, since the month of August the year of God 1560 years;" 1578, c. 61; 1581, c. 91, "The ratification of the liberty of the true Kirk of God and Religion, with confirmation of the Laws and Acts made to that effect of before," containing an important enumeration; 1581, c. 100; 1581, c. 104; 1581, c. 106; 1581, c. 115; 1584, c. 131; 1584, c. 132; 1587, c. 23; 1587, c. 24; 1587, c. 25, "That sellers and dispersers of erroneous books should be punished, and the books destroyed;" 1587, c. 27; 1587, c. 125; 1593, c. 168; 1594, c. 196; 1594, c. 197; 1600, c. 16.

[3] Appendix, Note A. For the statutes see Note B.

was received with great enthusiasm. Mary's first proclamation was, Knox says, "penned and put in form by such as before professed Christ Jesus;" and it forbade any one, on pain of death, to make any alteration until a meeting of the Estates on the "state of religion which her majesty found publicly and universally standing at her arrival in this her realm." Mary's object, doubtless, was to recover her ancient kingdom to the Romish faith; but the tide ran so strongly against her that she found it impossible to preserve even the mass held in her private chapel from the indignant intolerance of the new converts around. And shortly before her abdication she was able, with some show of truth, to take her subjects to witness, in an Act of Parliament, that "her highness, since her arrival, has attempted nothing contrary to the estate of religion which her majesty found publicly and universally standing." And all this time it was an "estate of religion," a reign of creed rather than of Church. The Church was not established—was scarcely recognised, certainly not as the national Church. Only the Estates of Scotland had solemnly confessed that "there has been, now is, and to the end of the world shall be, one Kirk—that is to say, one company and multitude of men chosen of God, who rightly worship and embrace Him." They had confessed also that "neither antiquity, title usurped, lineal descent, place appointed, nor multitude of men approving one error," were notes of the true Church; but, the true preaching of the Word, the right administration of the sacraments, and church discipline rightly administered. And wherever these last were found, though the number be about two or three, there is the Church of Christ—not the universal, of which they had given the definition before, but the particular, such as was in Corinthus, Galatia, Ephesus, and other places called in Scripture kirks of God. "And such kirks, we the inhabitants of the realm of Scotland, professors of Christ Jesus, profess ourselves to have *in our towns and places reformed.*" Farther than this they did not go—till Darnley was murdered in Kirk-of-Field, and

Mary, after marrying Bothwell, succumbed to the indignation of her subjects.

And then, in the Parliament of 1567, that great Act was passed, "Anent the true and holy Kirk, and of them that are declared not to be of the same" (1567, c. 6), by which (far more than by the subsequent Act of 1592, which has been called its charter) the Church was formally recognised and defined. It is never to be forgotten, for it is very much a key to the history of Scotland, that the civil power thus actually sanctioned the creed of the Church seven years before it recognised the Church itself. And yet it was but one step more they had now to take. They had already confessed the religion and the Evangel, and had avowed that there was a church, or at least that there were churches of God in the realm. That state of matters had continued for many years, and for the last seven years had been avowed. The Act now proceeds upon it:[1]—

> Our sovereign Lord, with advice of his three Estates, and haill body of this present Parliament, has declared and declares the ministers of the blessed Evangel of Jesus Christ, whom God of His mercy has now raised up among us, or hereafter shall raise, agreeing with them that now live in doctrine and administration of the sacraments, and the people of the realm that professes Christ as He is now offered in His Evangel, and does communicate with the holy sacraments (as in the Reformed Churches of this realm are publicly administered) according to the Confession of the Faith, to be the only true and holy Kirk of Jesus Christ within this realm.

Several things will be observed in this important enactment. It is declaratory, proceeding upon a state of things fully understood and for a number of years avowed, but which it now formally accepts, declaring the existing Church to be the true one. Secondly, it not merely acknowledges, but it establishes the Church (so far as enactment without endowment goes); and it establishes it not only for the

[1] Some confusion crept into the printing of this Act, and on this account it was corrected and re-enacted in the year 1579: Act c. 68. In the text above I give the corrected version, the original one being in its place in the appendix to this First Book.

present, but for all future time. And, lastly, it not only acknowledges and establishes, but it defines the Church. It does so by the "Evangel" as then preached, by "doctrine" as then held, and by the "sacraments" as publicly administered. And by affirming that this is the "only Church," it legislatively excludes all others. (So far the enactment presents a striking analogy to the original establishment of Christianity by the Emperor Theodosius, which defines it as the religion of Bishop Damasus.) But the definition is made more valuable for our purposes when it is added, "according to the Confession of the Faith." And this application of the Creed of 1560 as, along with participation in the sacraments, a test and definition of the Church, comes out still more plainly in the rest of the enactment, which

> Decerns and declares all and sundry, who either gainsay the word of the Evangel, received and approved, as the heads of the Confession of the Faith professed in Parliament of before in the year 1560 years, as also specified and registrate in the Acts of Parliament made in the first year of his highness's reign, more particularly do express, or that refuse the participation of the holy sacraments as they are now ministered, to be no members of the said Church within the realm [and true religion [1]] now presently professed, so long as they keep themselves so divided from the society of Christ's body.

Thus it was that the Church, which seven years before had persuaded the Estates to acknowledge its creed as the truth of God, was, by a much later Act, acknowledged as being the Church of God. And the latter transaction was so far founded upon the former. It is the Confession of 1560 which in the Act of 1567 more particularly defines the Church.

But if the State in its dealing with creed acted independently of the Church, and indeed so long ignored it, the position of the Church during the same period is equally striking. We have seen it already as the "Congregation of Christ Jesus," embracing "particular Kirks;" and when

[1] These three words are not in the old Act.

"convened in council," making occasional ordinances for common prayers, doctrine, preaching, and interpretation of Scripture in all parishes; but without any regular polity or common ecclesiastical action. The great crisis for the Church in Scotland, as well as for every other interest there, was that of 1560. It was 1567, indeed, which statutorily recognised or established it, and so turned it, by State authority, from the Church in Scotland into the Church of Scotland. But while there is overwhelming evidence to show that the Church held itself long before this statute to be the Church of Christ in Scotland, there is not a little to indicate also that it held itself to be the Church of Scotland, if indeed in their view there was any difference between the two phrases. At all events, the Church of Knox, which even before 1560 called itself "the Congregation of Christ within the realm," was not likely to make too little of the all but unanimous approval of its whole doctrine by the Estates of Scotland. Besides, in the Confession itself there are two important doctrines bearing on the subject. They say nothing there, indeed, about a Church of Scotland. They confess first, like all the creeds of the Reformation, a church catholic, which is invisible, but consists of all throughout the world who individually believe in Christ. They also acknowledge particular churches visible in the "cities, towns, and places of Scotland"—that is, particular congregations. So far they have not arrived even at one church in Scotland, still less a Church of Scotland. But they go on to say, "We confess and acknowledge empires, kingdoms, dominions, and cities to be *distincted and ordained by God;* . . . so that whosoever goeth about to take away, or to confound the whole state of *civil policies, now long established*, we affirm the same men not only to be enemies to mankind, but wickedly to fight against God's expressed will." After this strong and rash expression of a divine right in existing nationalities, a particular Church of Scotland became almost a necessity, and they scarcely needed the doctrine which immediately follows in the same

chapter, but which is still more conclusive, that "kings, princes, rulers, and magistrates are appointed not only for civil polity, *but also for maintenance of the true religion.*" This latter principle they could, indeed, in the mean time make but partial use of; for their queen, "God's lieutenant," was steadily and skilfully hostile to them. But it was the manner of the Church in Scotland, then and always, to take all the recognition it could get, to demand more, and to protest that it had full original rights apart from any recognition at all. So here while the Church had assumed independent national action, without the magistrate, in regard to matters of polity, its apologists were obliged to take up a similar position even with regard to the creed. Immediately after the Parliament of 1560 voted the Confession, the Lord of St John (Sir James Sandilands) was sent to France to get the ratification of it by the young queen, then the wife of the Dauphin. He was not well received at the great Catholic Court of St Denis.[1] "No ratification brought he unto us. But that we little regarded, nor yet do regard; for all that we did was rather to show our dutiful obedience, than to beg of them any strength to our religion, which from God has full power, and needeth not the suffrage of man, but in so far as man hath need to believe it, if that ever he shall have participation of the life everlasting." While this most characteristic utterance shows the position which Knox was prepared to take up, if need be, against the Estates as well as the sovereign, it cannot be doubted that he and the whole Church highly valued the sanction which had been given to their Confession by the former power. Had this not been given, the Confession would have remained simply the creed of the Protestants in Scotland, exhibited to the Estates and rejected by them. As it was, they could claim that there

[1] "Gusiani in eum asperrime cohorti increpabant, quod homo sacræ militiæ addictus mandata rebellium pro heresi illa execrabili, quam tum maximus omnium gentium consensus in Concilio Tridentino damnaret, perferenda suscepisset."—Historia Georgii Buchanani (folio, 1582), 199.

was a "state of religion publicly and universally standing" when their queen came.

The Parliament had met, and the Confession had been ratified in August; and in December of the same year, 1560, the first General Assembly was held. We have seen already the two steps of theory by which these bodies may have founded a Church of Scotland out of the "particular Kirks;" and the curious may trace the actual transition year by year in the "Book of the Universal Kirk."[1] Whatever the theory may have been, it was practically by meeting in General Assembly that the "particular Churches of Scotland" became "the whole Church convened," and "the universal Church of Scotland;" and it is strange to find the verbal traces of the old confused state of matters in the record of the polity which was superseding it. But with this the very first General Assembly, and its work, commenced the long and fated question of Church independence. By it the Book of Discipline of the Church was "examined, allowed, and approved," and then, like the doctrinal Confession a few months before, presented to the nobility,[2] but with a

[1] This earliest record of the minutes of Assembly is entitled 'The Booke of the Universall Kirk of Scotland: wherein the heads and conclusions devyset by the ministers and commissionaris of the particular Kirks thereof are specially expressed and contained.' (In this work we quote the edition in one volume, 1839.)

[2] The right of the State to an independent judgment on Church matters is acknowledged in this transaction as clearly as it had been formerly with regard to matters of doctrine: "For as we will not bind your honours to our judgments further than we are able to prove by God's plain Scripture; so must we most humbly crave of you, even as ye will answer in God's presence, before whom both ye and we must appear to render account of all our actions, that ye repudiate nothing for pleasure and affection of men, which ye are not able to disprove by God's written and revealed Word."

It is well to observe here, what the reader of Scottish Church history finds everywhere afterwards, that the Book of Discipline is a sort of creed—a declaration of what was supposed to be God's mind and will in the particular region of Church matters. To follow out all the subsequent discussions on Church polity and discipline in this volume would be quite impossible—it would be to write the history of Scotland. But through them all *this* remained the position of the Church—

different result. The Council from the first refused to sanction it;[1] and when the queen returned shortly after, it became hopeless to expect that this could be obtained.

The result was remarkable, and throws the strongest light upon the interesting period between 1560 and 1567, when there was a creed of Scotland established, but no Church of Scotland established. The Book of Discipline being rejected by the State, the Church itself approved (and indeed the Assembly of 1560 had seemingly "subscribed"[2]) this scheme of its polity; and it instantly proceeded to carry it into execution, so far as all matters within its own control were concerned. The General Assembly continued to meet by the authority of the Church itself,[3] and year by year laid the deep foundations of the social and religious future of Scotland. From 1560, if not earlier, down to 1567, the Kirk was a voluntary Church, in the sense that not only endowment, but jurisdiction and authority, and even recognition, were denied her by the State. Yet during all this time the records of the first fifteen General Assemblies, preserved in the Book of the

not lower, founding on expediency; nor higher, founding on a Church right to give doctrine to the world; but merely, a continual *confession* of a Church order supposed to be delivered to men in Scripture—a faith in an external revelation, over which men had no power but to confess and obey it. The whole strength, or weakness, of the Church for many ages lay in this position.

[1] Knox writes the reasons with his sharpest pen: "Some were licentious; some had greedily gripped the possessions of the Kirk; and others thought that they would not lack their part of Christ's coat."

[2] "Thus far out of the Book of Discipline, which was subscribed by the Kirk and the lords"—*i.e.*, certain of the lords of the Council.

[3] It has been observed that the doctrine of the independence of the Church has not that prominence in the writings and actings of Knox which his more zealous followers would have desired. The fact is, that that doctrine in its explicit form is scarcely found there. The work of that founder of our nation was to build up, not to break down—to unite Church and State in a perpetual bond, not to suggest reasons for their separation. Yet in that age of principles, men, whether they willed it or no, went deeper than the political surface; and in perusing every page of his History, we feel heaving under our feet the *ignes suppositos* of many a future explosion. This comes out especially in the conversations with Maitland, his great

Universal (*i.e.*, whole) Kirk, show abundantly that the Church did not shrink from exercising all judicial and administrative and legislative—in short, all conceivable—functions of a Church; while for all civil objects and results that her unaided powers (stretched not a little) failed to attain, she constantly and clamorously appealed to the State, which for the time refused to hear.

Nearly three centuries later it was claimed pertinaciously at the bar and on the Scottish bench, as well as by the predominant party in the Church, that the State acquiesced in this independence claimed by the Church, and that on this understanding it was afterwards established. The claim was rejected after the fullest and most careful consideration; but while it has been decided that the claim of the Church was never submitted to by the State, the fact that such a claim was cherished and put forth by the Church itself has scarcely been seriously disputed, and the immense preponderance of historical evidence is in its favour. Yet while the claim of independence, made always in respect of Church polity and jurisdiction, applies *a fortiori* to that of Church faith and doctrine, the conflicts have generally taken place about the former, not about the latter. The creed at the time of which we now treat was the bond between the Church and State—the one thing which both held, and to which they professed a common allegiance; and it has been

adversary, who, says Mr Froude, "would at any age of the world have been in the first rank of statesmen." The clear-sighted Erastian had objected to the first Assembly held after the arrival of Queen Mary, as being convened without her authority. Knox, of course, scouted the objection; but his reason is interesting: "Take from us the freedom of Assemblies, and take from us the Evangel; for without Assemblies, how shall good order and *unity in doctrine* be kept?" The connection between synods and community of creed is brought out more fully in the article on councils quoted in the appendix to this chapter.

It may be remembered that the freedom of assembly—the right to hold synods and councils apart from any permission by the State—has been held, even by High Churchmen (as by Mr Gladstone in his 'State in its relation to the Church,' ii. 28, 34), to be a test in the last resort of that native independence of the Church which for a time the Church may resign.

the one thing from which, amid the innumerable struggles that have since taken place between the two parties, neither has quite broken away. Yet what has not occurred in the past may occur in the future; and though it might seem unnecessary, after 1843, to consider the effect of the old claims of independence upon the Established Church and its creed, the Assemblies of 1898 and 1901 prove the contrary. But proposing in this volume to consider the relation to creeds, not only of the Church of Scotland, but of voluntary Churches claiming to represent its more ancient principles, it will be very necessary to bear in mind the position of the Universal Kirk before 1567.

We have seen the historical origination of the creed by the State and the Church, and their mutual relations in regard to it. Another interesting question arises, How far did they, or either of them, intend themselves to be permanently bound to this creed? The question is raised in the most striking way by the "Protest" embodied by the churchmen who compiled the Confession of 1560 in the Preface to it: "Protesting that if any man will note in our Confession any article or sentence repugning to God's holy Word, that it would please him, of his gentleness, and for Christian charity's sake, to admonish us of the same in write, and we of our honours and fidelity do promise unto him satisfaction from the mouth of God—that is, from His holy Scriptures, or else reformation of that which he shall prove to be amiss." And a commentary on this abnegation of infallibility and expression of the right of private judgment is given in the article of the Confession which treats of general councils. It goes very far, asserting that the right of councils is "neither to forge new articles of our belief, neither to give the Word of God authority, much less to make that to be His word, *or yet the true interpretation of the same, which was not before by His holy will expressed in His Word.*" None of the Confessions of the Reformation has a stronger expression of that right and duty of private judgment, on which they

are all founded, and which they in so many ways tend to repress. The question at once occurs, How far this protest for freedom to follow God's Word only is reconcilable with enactments by the State founding the Church upon the Confession, or at least defining it by the Confession, as in the fundamental Act of 1567; or, indeed, with enactments by the Church itself binding itself for the future to the Confession of its present faith? It is difficult, on the one hand, to see how the Church can be recognised and established without some definition, such perhaps as the Confession supplies; on the other, the declaration that those who in all time coming shall believe it, and those only, are the true and holy Church of Christ Jesus, leaves little room for that correction of the Confession which our Reformers pray men of their gentleness to make.[1] It is to be remarked that the preface which contains this remarkable petition, and which is addressed by the Estates to all countries, though inserted in the minutes of the Parliament of 1560, is omitted when the Confession comes to be re-enacted in 1567, and does not now appear on our Statute-book. It remains, therefore, a document rather of the Church than of the State, and indeed is very characteristic of the former, so far as aspiration for freedom is concerned.[2] And yet we find that the Church, which always outran statesmen in its passion for orthodoxy, accepted establishment on conditions which seem practically to tie it down to doctrine, and, except on two important occasions of subsequent history, has never shown more than a

[1] It must not be forgotten that the Church gave a certain sanction to other doctrinal confessions and utterances.

[2] The Scottish Confession, indeed, seems to have been felt as no bar, either to that sympathy with foreign Churches, by which the Scottish feeling of responsibility to European opinion (which Mr Froude notes) was at this time enriched, or, on the other hand, to the use of all other means of diffusing religious truth among the people at home.—See Notes upon the Catechisms of the Scottish Reformation (London, 1866), by Horatius Bonar, D.D.; where the sequence of Calvin's, Ursins's, and Craig's Catechisms, successively sanctioned by or used in the Church of Scotland during the reign of its earlier Confession is traced.

formal willingness to carry out the protestation of 1560. Scotland has always, indeed, asserted the Word of God to be "the only *rule* of faith," while the creed is only the utterance, expression, or confession of that faith. It has always preferred to call this document not the standard, but one of the "subordinate standards," of the Church, reserving the absolute name for the holy Scriptures. Yet ever since the passing away of that noble generation of men whose earlier years were spent in rejecting the right of the Church to impose upon them any creed, and their later in fixing down, by civil and ecclesiastical enactment, their own creed upon all generations to come [1]—ever since that insurrection of private judgment which we call the Reformation—private judgment has been frowned upon in Scotland; and down to the close of the nineteenth century the people and the youth have been practically referred, not to the "truth of God" alone, but to that wise and careful interpretation of it which their ancestors used *their* private judgment to attain.

It is to be remarked, however, that in the whole literature of this time, and especially in civil and ecclesiastical enactments, the Confession is always treated as a *whole*. Adherence to it is used as convertible with adherence to "the Evangel," or with "profession of Christ Jesus." One living principle, of immediate acceptance with God through His promise in Christ, in opposition to a system which was supposed to interpose a screen between God and man, burns through all the documents. And there is no approach to the idea which oppresses the mind of a colder age, that a confession is a vast congeries of propositions, all of nearly equal importance, and to be dealt with individually rather than collectively. It is also very manifest that this is essentially a Reforming Confession—not so much a scien-

[1] How the Reformed Church, immediately after so strong a statement of the right of private judgment, was able to combine with it a passionate attachment to the dogmatic truth they held themselves to have attained, comes out well in their correspondence with no less illustrious a pupil than Queen Mary.—See Book of Universal Kirk, 34, 35.

tific exhibition of theology as an explosion of God's truth against Rome; and in this respect, as in the former, it affords a contrast to the later Confession of Westminster.[1] These characteristics of the Scottish Confession are important for the study of the legislation of the time; and will probably be held of value in interpreting not only the greater statutes already narrated, declaring the Confession to be the Confession of the Church and those gainsaying it not to be members of the Church, but also those which we now proceed to notice demanding individual adherence to it, and even subscription.

Subscription is a distinct and additional step; and we find no record of this having been formally, or at least statutorily, required till 1572. John Knox was still alive. The Queen of Scots was in prison in England. Scotland was torn by civil dissensions—the regent, in alliance with Elizabeth of England, waging doubtful war with the Roman Catholic barons. The Reformed Church was trodden aside amid the feudal turbulence; but in consequence of the representations of Erskine of Dun, the Convention of Leith was held, and the result was that curious compromise by which bishops and superintendents were retained in the Church, but both were made subject to the General Assembly *in spiritualibus*. But another result of this conference between "the commissioners of the king's majesty and the Reformed Kirk of Scotland" was the Act of date 26th January 1572, which usually appears in our Statute-book under the rubric, "That all ecclesiastical per-

[1] The object of the Confession is best to be gathered from the preface: "A thirst to notify unto the world the sum of that doctrine which we profess, and for which we have sustained infamy and danger," led to it; "partly for satisfaction of our brethren" who hear us calumniated, and "partly for stopping the mouths of blasphemers"—*i.e.*, revilers. "For God we take to witness in our consciences, that from our hearts we abhor all sects of heresy, and all teachers of erroneous doctrine," and they profess themselves ready to die for "the purity of Christ's Gospel."—See Preface in Appendix A.

sons should subscribe the Confession of the Faith. Of heretics;" but which in the minutes of Parliament (Thomson's Acts, vol. iii.) bears the title, "That the adversaries of Christ's Evangel shall not enjoy the patrimony of the Kirk" (1572, c. 46). And the later part of the Act gives the rule for enforcing this Confession as a test: "If any person ecclesiastical, or who shall have ecclesiastical living, shall wilfully maintain any doctrine directly contrary or repugnant to any of the said articles, and being convened and called as follows, shall persist therein, and not revoke his error, or after his revocation shall of new affirm such untrue doctrine, such maintaining, affirming, and persisting shall be just cause to deprive him of his ecclesiastical living." This Act, however interesting, is not so important as it appears. It and the subsequent Act 1572, c. 47, "Of Apostates," which declares that "adversaries of the true religion are not subjects to the king," bear marks of having resulted from the horror felt throughout northern Europe upon the recent massacre of St Bartholomew's Day. They are also obviously safeguards chiefly for the filling of the more lucrative higher offices now proposed to be introduced into the unwilling Church; and they shared in the dislike felt for Morton the regent, and in the discredit which very soon attached to the Convention of Leith. There is no notice whatever taken of the Act as to subscription in the records of Assembly; and it does not appear that it was ever obeyed or carried into effect by the Church. Indeed, the regulations contained in it, excellent as they are, interfere (just because they are regulations) with that independent jurisdiction in matters of heresy which the Church in Scotland always claimed; and the very phraseology which it employs seems foreign to our ears.

Meantime, however, the Confession had evidently become not only a confession, but a standard, and even a test—and a test, too, to be enforced by subscription. A farther step seems taken in the very next Act, already referred to; for while this Act enforcing subscription (c. 46) only relates to

ministers, the Act 47 of the same Parliament declares "that none shall be repute as loyal and faithful subjects to our said sovereign lord or his authority, but be punishable as rebellers and gainstanders of the same, which shall not give their confession, and make their profession of the said true religion." It is not difficult to see how some things in these Acts should have been distasteful to the Scottish Church, which has always defended its members from any tyranny other than its own. And even with regard to its own use of doctrine, it is doubtful whether it originally intended its Confession, in all its parts, to be used as a test or term of communion. It was, perhaps, meant to be a standard; but the Church seems to have intended to keep its standard in its own hands, educating the people individually, until the weak in faith grew up to the full measure of the true and holy Church.

And the year 1567, which saw the establishment of the Church, had produced also the statute "declaring and granting" jurisdiction to it.[1] The Church had, of course, exercised it, without civil sanction, for the seven years before; and it now claimed it, in no humble tone, as "justly appertaining to the true Church and immaculate spouse of Jesus Christ." But the Parliament was cautious in its enactment. It "declared and granted it," using two terms, the distinction between which split the Church in sunder in the nineteenth century; and of this jurisdiction it says, that it "consists and stands in preaching of the true word of Jesus Christ, correction of manners, and administration of holy sacraments." This ambiguity was not satisfactory to the Church, even when joined with the intolerant declaration which follows, "that there is no other *face* of kirk nor other *face* of religion than is presently by the favour of God established within this realm; and that there be no other jurisdiction ecclesiastical acknowledged within this realm other than that which is and shall be within the same Kirk, or

[1] Acts of the Parliaments of Scotland (Thomson), iii. 24. Calderwood. Keith. Repeated in the Act 1579, c. 69.

that which flows therefrom concerning the premises." But a very important constitutional Act, "Anent the king's oath, to be given at his coronation," was passed at the same crisis of 1567; by which the kings of Scotland not only swore that "during the whole course of their lives they shall serve the Eternal God," and shall "maintain the true religion of Christ Jesus," but that "out of their lands and empire they shall be careful to root out all heretics and enemies to the true worship of God, *that shall be convict by the true Kirk of God of the foresaid crimes.*"[1] This was more like the footing on which the Church desired to have the matter; and the Church was left to claim and exercise this more special jurisdiction itself, as it does abundantly in the records of Assembly and in the Books of Discipline. The strongest statutory recognition of the ecclesiastical jurisdiction in matters of creed and heresy (prior to the Westminster Confession) is the indirect declaration embodied in the Act 1592, c. 116, by which the authority of the different Presbyterian Assemblies is established, and which provides "that the 129th Act of the Parliament holden at Edinburgh May 22, 1584" (which was an Act of Supremacy over Estates Spiritual and Temporal), "shall nowise be prejudicial nor derogate anything to the *privilege that God has given* to the spiritual office-bearers in the Kirk, concerning heads of religion, matters of heresy, excommunication, collation or deprivation of ministers, or any suchlike essential censures, specially grounded and having warrant of the Word of God." But whether by the assumption of the Church, or the acquiescence of the State, or the inference contained in the Acts which the Parliament did pass, it was early settled that the Church had complete and exclusive jurisdiction in matters of doctrine and heresy, and that over all Scotsmen, willing and unwilling alike. And the State proceeded—*e.g.*, by the Acts 1572, c. 53, and 1593, c. 164—to annex civil penalties to the ecclesiastical judgments, giving power, how-

[1] Statute 8 of Parliament 1567. Statute 6 had defined the true Kirk.

ever, to those whom the Church sought to punish by the secular sword, "to propone their lawful defences."

We cannot follow the changes of the time; nor in particular do I propose to go into the new era when the Scottish Church, by successive national covenants, gave form and body to the pious patriotism of its members. It is only necessary to remark that these engagements proceeded upon, and expressly bound the people to, the ancient creed with which the history began. Thus there is a document which fills a large space in our history as the National Covenant, signed by James VI. in 1580, and thence taking its name of the King's Confession of Faith. Its opening paragraph is one of the most characteristic of the old religion of Scotland that could be quoted. Yet this, the corner-stone of all the covenants, is nothing but a renewed adherence to the old Confession.

> We, all and every one of us underwritten, protest that, after long and due examination of our consciences in matters of true and false religion, we are now thoroughly resolved in the truth by the Word and Spirit of God. And therefore we believe with our hearts, confess with our mouths, subscribe with our hands, and constantly affirm, before God and the whole world, that this only is the true Christian faith and religion, pleasing God and bringing salvation to man, which is now, by the mercy of God, revealed to the world by the preaching of the blessed Evangel, and is received, believed, and defended by many and sundry notable Kirks and realms, but chiefly by the Kirk of Scotland, the king's majesty, and three Estates of this realm, as God's eternal truth, and only ground of our salvation; as more particularly is expressed in the Confession of our Faith, stablished and publicly confirmed by sundry Acts of Parliament, and which now of a long time hath been openly professed by the king's majesty, and whole body of his realm, both in burgh and land. To the which Confession we willingly agree in our consciences, in all points, as unto God's undoubted truth and verity, grounded only upon His written word.[1]

We have here acceptance of the creed by all Scotsmen—acceptance of it in all points—acceptance of it as the

[1] Mr Gladstone cites this as one of the most complete and extreme instances of *private judgment* since the Reformation.—State in its Relations with the Church, ii. 123.

personal faith of the individual—acceptance of it expressed in formula and certified by subscription—all demanded, under appropriate penalties, by both Church and State. We need trace the matter no farther. Through all the fluctuations of this first century of Scottish Church history, under presbyters, bishops, or superintendents, the Scottish Confession uttered by Knox to Parliament in "the beginning of the Evangel" remained the only creed which was fully acknowledged by both State and Church. It is true that in 1616 the Church, then fully Episcopal, ordained that a new Confession, engrossed in the Acts of Assembly, should be universally received and subscribed in the kingdom;[1] and this creed, somewhat more Calvinistic than that of Knox, must have had a certain authority for some years. At the enthusiastic Presbyterian Revolution in 1638, however, all the Acts of these Episcopal Assemblies were rescinded; and even when the Episcopal form of government was brought back after the Restoration, the Confession of 1616 was forgotten, and the old Confession of 1560 was restored.[2] The new creed which was to supersede it, and to become the doctrinal standard of modern Scotland, was to come into existence in a different way.

Midway in the history of the Scottish Church, its Confession of 1560 — the Scottish Confession proper — was exchanged for that of the Westminster Assembly. This step was taken by the Church in 1647, and was not sanctioned by the State for forty-three years after. The

[1] It had been proposed by the king's commissioners; and James VI.'s discourse on the 12th July 1617 is interesting, when we remember the new creed recently brought in: "Hear me, Mr Calderwood. I have been an older keeper of General Assemblies than you. A General Assembly serves to preserve doctrine in purity from error and heresy, the Kirk from schisme; *to make Confessions of Faith*, to put up petitions to the king and Parliament. But as to matters of order, rites, and things indifferent in Kirk policy, they may be concluded by the king," &c. —Calderwood, vii. 226, 233, and 262; and Book of the Universal Kirk, 595.

[2] Test Act, 1681.—See *infra*.

history of both incidents in the change must now be adverted to.

Scotland was no longer "distincted" as a kingdom by having a separate king. The monarch whose first Parliament ratified the Confession of 1560, ascended the English throne: and the immediate consequence was, on the one hand, an attempt on the part of the Stewart sovereigns to model the Church of Scotland on some English pattern; and a farther developing, on the other hand, in the minds of churchmen, of the doctrine (latent in 1560) of the independence of the Church. Nearly a hundred years passed away with varied fortunes, till, Charles I. and Laud having driven Puritanism and Constitutionalism into an alliance, an explosion occurred at Edinburgh in 1638, succeeded immediately by the famous Assembly of that year, and the resumption by the Church of its long-claimed autonomy. In England the popular party had a longer battle to fight. The civil war commenced in August of the year 1642. In the September following, Prelacy was abolished by the Parliament; and on 12th June 1643, an "Ordinance of the Lords and Commons in Parliament" was passed, calling the Westminster Assembly. It proceeds upon the statement that the "purity of religion" is "most dear to us;" that the liturgy, discipline, and government of the English Church require reformation; and, in particular, that such a government must be settled therein "as may be most agreeable to God's holy Word, and most apt to procure and preserve the peace of the Church at home, and nearer agreement with the Church of Scotland and other Reformed Churches abroad:" and it proceeds to call certain learned, godly, and judicious divines to consult and advise as to doctrine, with a view to these ends. On 22nd June, King Charles by proclamation forbade and denounced the meeting; but it commenced as ordered on the 1st of July, the Royalist divines staying away. On the 7th of August, commissioners from the Lords, Commons, and Assembly of Divines arrived in Edinburgh, with credentials addressed

both to the Convention of Estates and to the General Assembly, desiring aid and counsel from the more united northern nation. After discussions, in which, Baillie says, "the English were for a civil league, we for a religious covenant,"[1] they agreed, as the best means for "settling the true Protestant religion and propagating the same to other nations, and for establishing his majesty's throne," to have a bond including both the civil and the religious element, as a "most near tie and conjunction" between the two nations. The result was the *Solemn League and Covenant*, the chief articles of which are engagements, first, for the preservation and reformation of religion in the three kingdoms, "according to the Word of God, and the example of the best Reformed Churches;" and, secondly, for the extirpation of "Popery and Prelacy." It was passed unanimously by the General Assembly on 17th August, the Lord High Commissioner of King Charles refusing to concur; and soon after received the solemn assent of the Scottish Convention of Estates, the English Houses of Lords and Commons, and the members of the Westminster Assembly. Commissioners were appointed by the General Assembly to represent Scotland in the Assembly of Divines, the ministers being Henderson, Gillespie, Rutherford, and Baillie,[2] and the elders, Lord Maitland[3] and Johnston of Warriston.

The Assembly of Westminster was at first occupied with the Form of Church Government, and Directory for Worship; both of which, after numerous and interesting discussions raised by the Erastian and Independent members, were passed, carried to Scotland, and approved of by the General Assembly, with a proviso that their general ratification "shall be in noways prejudicial to the farther

[1] Baillie's Letters and Journals, ii. 90.

[2] The first three, men of high repute for learning and piety; the last, the Boswell of the Westminster Assembly.

[3] The representative of the family of that Maitland of Lethington who had adjusted the first Confession with Knox, this nobleman was afterwards too well known in Scotland as Duke of Lauderdale. The parallel between his history and that of his greater ancestor is curious.

discussion and examination" of certain articles. These documents so received by the Assembly have continued ever since to be of authority within the Church.

At a later period the Assembly took up the properly doctrinal part of their work, and in order to construct a Confession of Faith they on 9th May 1645 appointed a committee[1] and sub-committees to prepare each section and division, which were afterwards discussed and settled first by the larger committee and then by the Assembly itself. The whole was finished by November 1646, and towards the end of that year was presented to the Houses of Parliament. On the 22nd March 1648 a conference was held on the subject between the two Houses; but the Westminster Confession was never formally adopted by the English nation or by its parliamentary representatives,[2] the obstacle being the strong feeling, on the one hand, in the direction of toleration and Congregationalism, and on the other of Erastianism, which prevailed in the Parliament. Cromwell's government was followed by the counter-revolution and the re-establishment of Episcopacy, after which neither Puritanism nor its doctrinal Confession ever recovered their hold in England. In Scotland the Restoration brought with it, as we shall afterwards see, renewed

[1] The names of the Committee were Dr Gouge, Dr Hoyle, Mr Herle, Mr Gataker, Mr Tuckney, Mr Reynolds, and Mr Vines, with the four Scots divines. Neal, in his History of the Puritans (iii. 378), says that "the English divines would have been content with revising and explaining the Thirty-nine Articles of the Church of England, but the Scots insisted on a system of their own." Yet the system adopted was not their own; and the model of the Westminster Confession seems to have been the Articles of the Irish Church, framed under the care of Archbishop Usher. It was certainly not the Scottish Confession. For valuable remarks upon these historical relations of the new creed, see 'Lecture on the Westminster Confession of Faith,' by Professor Mitchell, D.D., St Andrews; Edinburgh, 1866.

[2] The Parliament proposed to leave out the thirtieth and thirty-first chapters, relating to Church censures and to synods and councils; as also the fourth paragraph of chapter twenty, on the power both of the Church and magistrate to punish open maintainers of mischievous opinions or practices. — See these paragraphs given in full in the appendix to this Book.

attempts to introduce Episcopacy, and a pressure on the Presbyterian Church, ending in a severe persecution; but at the close the Church system seems to have been deeper in the imaginations and hearts of the people than at any previous time, and the creed adopted in 1647 was accepted without any question in 1690 as that which the State was now willing to sanction.

As in the case of the Scottish Confession, we give in the appendix to this chapter the heads of all the chapters of that of Westminster, printing in full those sections which seem to bear on the subject of this volume.

Of the manner in which the Scottish Church adopted its present Confession we have, fortunately, very complete evidence in the important Act of Assembly of 1647, which we give in the appendix. It contains many points of interest, such as the importance of a Confession of Faith [1]

[1] The Westminster Confession, like that of 1560, has no chapter on creeds; and it lacks the preface which supplied that want in the case of its predecessor. On the other hand, it is fuller and more express in the doctrinal region around and near the subject of creed; and we may here collate these utterances.

The Confession declares that God "is truth itself" (c. 20, § 4); that holy Scripture is "therefore to be received, because it is the Word of God;" and that the authority of it dependeth not upon the testimony of any church; that "God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in anything contrary to His Word, or beside it, in matters of faith or worship" (c. 20, § 2); and that all synods and councils may err, and are not therefore to be made the rule of faith, but are to be used as a help to faith (c. 31, § 4). And yet this Christian liberty is not opposed to the "powers which God hath ordained," which are also set forth. God, the King of the world, hath ordained civil magistrates under Him for "His own glory and the public good;" and it is the magistrate's duty not only to take order for the unity of the Church, and the purity of God's truth, worship, and ordinances, but also to punish those who publish scandalous and mischievous doctrines (c. 23). The invisible Church is the whole elect, living and dead, and yet to live, under Christ their Head: the visible Church consists of all those everywhere "that profess the true religion;" and visible or particular Churches, with the highest privileges from Christ their King, are yet subject both to mixture and error (c. 25). They have from Him a government in the hands of church-officers, distinct from the civil magistrate; these officers have a "power of the keys," by the Word and Gospel, and also by

(as "the chiefest part of that uniformity in religion" which the three kingdoms were bound to endeavour); the deliberation of the Scottish Church in adopting the Confession, which was printed for the inspection and consideration of members, and not only examined in private, but twice publicly read over; the twofold approval of it, first, "as to the truth of the matter, judging it to be most orthodox, and grounded upon the Word of God;" and also, "as to the point of uniformity, agreeing, for our part, that it be a common Confession of Faith for the three kingdoms;" and, lastly, the independence of the Church's reception and approval of it, as shown in all these circumstances, and still more remarkably in the several explanations and modifications under which alone they accept and ratify it. These modifications are two—a reservation in favour of the system of Presbytery (the description of which, omitted from the Confession, is only given in the Directory), but which they indicate to be the "truth of Christ;" and a full statement as to the power of the magistrate in reference to synods or

censures and absolution (c. 30); and Christ's ministers may meet in synod or council with or without the magistrate, and to them so met it belongeth, not of their own authority, but as appointed thereunto by God, "to determine controversies of faith" in accordance with His Word. And while this is the function of synods, and the "civil magistrate may not assume to himself the administration of the Word," he has yet authority, in order "that the truth of God be kept pure and entire," to call synods, be present at them, and to "provide that whatsoever is transacted in them be according to the mind of God" (c. 23).

It appears to result generally from the paragraphs here reviewed and quoted in the appendix, that creeds (which are not directly treated of) have no proper authority, that being given only to truth or God's Word; that, however, both the magistrate and the Church having to deal with God's Word—the latter as its proper work, the former indirectly—they *may* have an interest that creeds be constructed, but that it is rather the province of the Church to construct them with the magistrate's countenance and sanction; that these two powers should work together in this matter, but if they cannot, may work separately; and, finally, that individuals, churches, and states are at all times and inalienably free to follow truth rather than their creeds, but at the risk on the part of the Church of being punished by the State, on the part of the State of being censured by the Church, and on the part of the individual of suffering in both ways.

assemblies, and of the right to the Church to meet even without his consent.

No mention is made in this Act of the old Confession of 1560. It may be supposed that the Assembly held both their old Confession and their new to be true, and therefore consistent with each other; but this is not stated. Whether in any sense they held the old Confession to be still binding is a more doubtful matter. As the new one is to be a "Confession for the three kingdoms," it may be argued that the old Scottish Confession might still continue as a municipal or domestic authority for Scotland; but as the change is founded on the obligation to "uniformity in religion," the presumption seems rather in favour of the exclusive authority of the new creed.

The fact that the Scottish Church did, in the period of its greatest energy and influence, and indeed at the culminating point of its history, throw away the old creed upon which it might plausibly be said to have been even founded, and *proprio motu* exchange it for another and a wholly new one, casts a strong and not unneeded light upon the previous and subsequent history. And this is not less striking when we observe that the new creed is in no respect a modification or re-presentation of the old. Not only is it the case that many propositions, and even whole paragraphs and chapters, contained in the Scottish Confession, are not found in that of Westminster, and that very many are found in the new creed which were not in the old,—but the two were not even made upon the same plan. The structure of the one is wholly different from that of the other. And they are equally different in details. There is no one sentence or proposition in the Westminster Confession identical with any one in the Scottish Confession. The new creed was made *de novo*, without any thought of the old. It is not necessary, in noting the differences between the Confessions, to suppose that these are irreconcilable. All truths are reconcilable; and an adequate intelligence could deduce the whole body

of divinity with absolute certainty from any one limb or fragment. But that very large differences do exist is certain. We shall have occasion afterwards to notice that, on so important a matter as the doctrine of the visible Church, these creeds are separated by the bulk of the Confessions of the Reformation. The doctrine of the Magistrate, of the Sabbath, of Predestination, of Assurance, of Church rulers, and of the Sacraments, may be instanced as matters in which all theologians have observed a great difference, while some have alleged a decided contrast, between the two.[1] And while the diversity extends to each sentence and to each clause of each sentence, there is a difference in the tone and sentiment, as well as in the mode of treatment and style of thought, of the whole, which reminds us of the lapse of the century between, and of the difference between the stand-point of the Reforming and the Puritan age—a difference not so great, perhaps, as between that of the Puritans and our own, but still one which is unmistakable and important.[2] That the Scottish Church, bound with innumerable oaths and engagements to its old creed, should have voluntarily made a change so great without the smallest scruple or hesitation

[1] See Herzog's Real-Encyclopädie, article Schottland, xiii. 708. In 1831 Edward Irving printed an edition of the older Scottish standards, including the Confession, with a preface, some portions of which students of this subject may find very interesting, as showing not so much the particular differences (which Irving was incapable of noting minutely or accurately), as the general influence of the Confession of Knox upon a mind singularly open to such influence. Irving's preference for the older Confession on the subjects of faith and assurance was shared by the "Marrow men," divines far more trusted in Scotland than the illustrious London preacher. Two of these ministers, in the year 1725, even brought in their commissions to the General Assembly, "a declaration that they had signed the Confession of Faith as agreeable to our old standards." — Wodrow's Correspondence, iii. 194.

[2] The mere difference of style of the new Confession is interesting—for example, that "*materiæ spissitudo*" which the old Latin translators of it plead to the reader as their excuse "si oratio nostra minus fluere tibi videatur." See appendix to Dr Niemeyer's Collectio Confessionum; Leipsic, 1840.

on the part of a single member of it, indicates a vitality in the protestation for freedom of 1560 which the intermediate history had scarcely given us the right to expect.

Two years after the General Assembly had adopted the Westminster Confession, the Estates of Parliament, "having seriously considered the Catechisms, with the Confession of Faith, with three Acts of Approbation thereof by the commissioners of the General Assembly, presented unto them by the commissioners of the said General Assembly, do ratify and approve the said Catechisms, Confession of Faith, and Acts of Approbation of the same." [1] But this was one of the Parliaments whose Acts were abolished by the Act Rescissory of Charles II.; which, however, professed "to maintain the true Reformed Protestant religion in its purity of doctrine and worship." No countenance is here intended to the Westminster Confession, which was the child of the Solemn League and Covenant, always denounced as "treasonable." The first Act of the second session of Parliament indeed went further, and annulled "all Acts of Parliament by which the sole and only power and jurisdiction within this Church doth stand in the Church," and by which it would seem that the office-bearers of the Church had any "church power, jurisdiction, or government, other than that which acknowledgeth a dependence upon and subordination to the sovereign power of the king as supreme." The same Act restores the "ancient and sacred order of bishops;" while the first Act of his second Parliament (1669) asserted positively "his majesty's supreme authority and supremacy over all persons, and in all causes ecclesiastical, within his kingdom." The Westminster Confession is all this time ignored; and the famous *Test*, ordered in 1681 to be administered to all persons in trust, goes expressly back to the Scottish Confession. Before going on to renounce the Covenants and acknowledge the king's jurisdiction in ecclesiastical causes, it commences, "I own and sincerely profess the true Protestant religion, contained

[1] Feb. 7, 1649.

in the Confession of Faith, recorded in the first Parliament of King James VI., and I believe the same to be founded on and agreeable to the Word of God."[1] The passing over the Westminster Confession is the more remarkable, as it is at this point that Bishop Burnet (on such a matter an impartial and competent witness) tells of the complete hold the later creed had got of the people. At this year, 1681, he says, the Confession of 1560 "was a book so worn out of use that scarce any one in the whole Parliament had ever read it; none of the bishops had, as appeared afterwards. *For these last thirty years* the only Confession of Faith that was read in Scotland was that which the Assembly of Divines at Westminster, *anno* 1648, had set out, and the Scotch Kirk had set up instead of the old one; and the bishops had left it in possession, though the authority that enacted it was annulled." This is borne out very much by the unquestioning way in which the Westminster Confession was afterwards received by all parties to the Revolution Settlement, when even those who, like William of Orange, desired to gather into the reconstituted Church all the Episcopal clergy, apprehended no difficulty in their signing the Westminster Creed. With regard to the mass of the people, there can be no doubt that the Test proposed to them a Confession which they had forgotten, and a doctrine as to supremacy over the Church which most of them by tradition disliked, and some on principle abhorred. Their steadfast resistance is manifest as we go on into the Statute-book of James II., crowded with inquisitorial and persecuting Acts—the eighth statute of his first Parliament, for example,

[1] The oath goes on to "affirm and swear, by this my solemn oath, that the king's majesty is the only supreme governor of this realm over all persons, and *in all causes, as well ecclesiastical* as civil; . . . and I judge it unlawful for subjects, upon pretence of reformation, or any other pretence whatsoever, to enter into covenants or leagues, or to convocate, convene, or assemble in any councils, conventions, or assemblies—to treat, consult, or determine in any matter of state, civil or ecclesiastic, without his majesty's express command or special licence had thereto."—Third Parl. of Charles II., c. 6.

enacting that those who are merely "present as hearers at field-conventicles shall be punished by death and confiscation of their goods."

We have now come down to the Revolution of 1688.

When William of Orange landed, the Estates of Scotland met, and, declaring in their letter to him that "religion, liberty, and law are the dearest concerns of mankind," they in all their subsequent enactments observed the same order and precedence of religion over other interests.

The first statute of King William's second session was one rescinding the Act of 1669 already mentioned,[1] which is described as "asserting his majesty's supremacy over all persons and in all causes ecclesiastical." The second restores the ministers who had been banished "for not conforming to Prelacy, and not complying with the courses of the time." The third and fourth relate to elections of commissioners and committees of Parliament. And the fifth is that most important statute, "Ratifying the Confession of Faith, and Settling Presbyterian Church Government,"[2] the chief part of which runs as follows:—

> Our sovereign lord and lady, the king and queen's majesties, and three Estates of Parliament, conceiving it to be their bound duty, after the great deliverance that God hath lately wrought for this Church and kingdom, in the first place to settle and secure therein the true Protestant religion, according to the truth of God's Word, as it hath of a long time been professed within this land; as also, the government of Christ's Church within this nation, agreeable to the Word of God, and most conducive to the advancement of true piety and godliness, and the establishing of peace and tranquillity within this realm; and that by an article of the Claim of Right it is declared that Prelacy, and the superiority of any office in the Church above presbyters, is and hath been a great and insupportable grievance and trouble to this nation, and contrary to the inclination of the generality of the people ever since the Reformation, they having reformed from Popery by presbyters, and therefore ought to be abolished; likeas, by an Act of the last session of this Parliament,

[1] 1690, c. 1.

[2] 1690, c. 5.

Prelacy is abolished; therefore their majesties, with advice and consent of the saids three Estates, do hereby revive, ratify, and perpetually confirm, all laws, statutes, and Acts of Parliament made against Popery and Papists, and for the maintenance and preservation of the true Reformed Protestant religion, and for the true Church of Christ within this kingdom, in so far as they confirm the same, or are made in favours thereof. Likeas, they by these presents ratify and establish the Confession of Faith, now read in their presence, and voted and approven by them, as the public and avowed Confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches (which Confession of Faith is subjoined to this present Act). As also they do establish, ratify, and confirm the Presbyterian Church government, &c.

Some things may be at once observed with regard to this Act.

Both in the preamble and in the enactment the settlement of religion takes precedence of the settlement of the Church.

The religion to be settled and secured is described in the preamble as "true;" as "Protestant" (or perhaps this means the truly Protestant religion); and as "according to the truth of God's Word;" but also, "as it hath of a long time been professed within this land."

A *contrast* is acknowledged between this religion and Popery, insomuch that it is not held too vague to confirm all Acts against Popery and Papists, and in favour of this true religion and the true Church of Christ.

A continuity and identity is acknowledged in this true religion that has been "of a long time professed in Scotland"—seemingly, indeed, "ever since the Reformation:" insomuch that the present Confession (though not the original one in favour of which the Acts confirmed had been made) "contains the sum and substance of the doctrine of the Reformed Churches."[1]

Lastly, this *Scottish Religion* is confirmed not only as the

[1] The expression "Reformed Churches" is of course equivalent in our law to "the Protestant Churches." Abroad, the "Reformed Churches" have come to mean the Calvinistic, as distinguished from the Lutheran or Evangelical: but this is not the sense of the Act.

religion of the people and Church of Scotland, but as "true," and "according to God's Word;" and the Church is acknowledged as the true Church of Christ.

A question may be raised whether the Confession of Faith is adopted in the same express and absolute way in this statute as the "true Reformed Protestant religion" is. But what the Revolution Settlement certainly establishes is—1. The doctrine historically held by the people of Scotland (especially as that doctrine is common to the Reformed Churches and opposed to Popery); and this doctrine it confesses to be the truth of God. 2. The Presbyterian Church. 3. The Westminster Confession, as the public doctrine of the Church,[1] and now (generally) approved by the State.

[1] An idea has been frequently suggested that the Church of Scotland, and even the ministers of it, are bound by the Confession of Faith only in so far as it is the "sum and substance of the doctrine of the Reformed Churches;" and in fact are only bound to that substance of doctrine. It is to be observed—

1. So far as individual ministers are concerned, their adherence is regulated not by the Act 1690, from which these words are taken, but by the very strict terms of the Act 1693.

2. Even as to the Church, the words of the Act 1690, if construed on the ordinary principles of interpretation, are unfavourable to this suggestion. By it the Confession is ratified "as the public and avowed Confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches." It does not appear, as has been already remarked, that the State ratifies the Confession as absolutely true. It does not say that it *is* the sum and substance of the Reformed doctrine; in which case, as we gather from the rest of the Act, there would have been no hesitation in ratifying it absolutely. It says that it *contains* that sum and substance, and therefore it ratifies it as the permanent Confession of the Church which had already adopted it. But it is the Confession which the statute thus ratifies—the Confession as it was read—and not the Reformed doctrine. (It does not appear that the word "as" is to be read in connection with the word "containing." The words "containing the sum and substance of the doctrine of the Reformed Churches" appear to be not *taxative* or conditioning, but *demonstrative* or descriptive.)

3. While this seems to be the strict construction, three things are to be observed on the other side. The Confession is treated as a whole, as a unity, almost as a system. It is ratified not as a detail of the doctrines of the Church, nor as a heap of propositions about these doctrines, but as *the* Confession of this Church — a Confession having gradation, subordination, and structure—having such an

Another point of considerable interest in this statute relates to the independence of the Church as to the new Confession.[1] Does the Act impose a creed upon the Church, or does it ratify it as adopted by the Church long ago? It ratifies *the* Confession of Faith, meaning thereby not the Scottish Confession, but that of Westminster, which hitherto had only an ecclesiastical existence in Scotland. On the other hand, it ratifies and establishes it as "now read in the

essential unity in it as to contain the sum and substance of thirty or forty Reformed Confessions, all of them systematic, and all so harmonious that this statute speaks of them in the singular number, as "the doctrine" of the Reformed Churches, and substantially one. In the second place, the statute refers to the Confession not only in connection with the doctrines of other Churches, but with the past history and past doctrine of the Church of Scotland; and recognises the doctrine as the same, though the Confession had been changed. In the third place, it is known that this was done not *per incuriam*, but deliberately, and with an intention, on the part of the sovereign at least, of recalling and perhaps reuniting the Church of Scotland to other Churches.

While, therefore, to qualify or limit the Confession by the "substance of Reformed doctrine" would be to invert the meaning of the enactment, and to interpret *obscurum per obscurius*, contrary to the usual principles of exegesis of statutes, it does seem suggested or demanded by the Act that in all administration of the Confession by the Church or the Court respect shall be had to its character as a system of Reformed doctrine, an organisation of truth, in which some statements are principles, others deductions, and others details, and the whole is greater than the parts—in which some root propositions are properly vital, and others partake of their life. And thus also where any question occurs as to the meaning of whole or parts, or as to their subordination, which is left doubtful on the face of the document itself, it should probably be answered by a reference to the doctrine of the Reformed Churches, and especially of the old Reformed Church of Scotland.

But these remarks are thrown out, and thrown out with deference, only on the point of interpretation of this Statute of 1690. The conclusion for freedom, which its words do not seem of themselves sufficient to support, may probably be reached by a wider historical survey, and a legislative application of more general principles.

[1] The Lord President Hope's statement in the Auchterarder case, given in the form of a narrative, seems to be more a projection into history of his own *theory* of a Church's rights in the matter: "Now as to this Act 1690, one circumstance is very remarkable. If there was one thing more than another within the compass of the exclusive cognisance and jurisdiction of the Church, it would seem to be the settling the terms of the Creed or Confession of Faith of the Church. But the Church knew that it could not do so, and did not venture to do so by its own authority. The Church drew up what she thought *ought to be* the

presence of the Estates, and voted and approven by them;" and it establishes it, so read, as "the public and avowed Confession of this Church," without any of those qualifications, reservations, or amendments with which alone the Church had avowed it. The minutes of Parliament bring out very satisfactorily the meaning of the enactment. The Confession was read finally on the 26th of May, and approved by vote. It was then moved "that the approbation of the Confession may be as it was approven by the General Assembly 1647," and it was "answered, that this were contrary to the vote approving the Confession *as read*, the Confession as approven by the Assembly containing some differences." As the result, "the clause relative to the Assembly 1647" was "left out." And two days after (on the same day when, in direct opposition to King William's desire, Presbytery was declared to be "the *only* government of Christ's Church within this kingdom"), the question as to 1647 being again raised, was decided as before. The minutes of a meeting a few days previous (23rd May) seem to show that, on the one hand, an attempt had been unsuccessfully made to dispense with the Confession as a standard altogether, or at least to leave "religion" very much to the "Church" alone; while, on the other hand, a motion "that the Assembly be prohibited to make any Act contrary to the standing laws of the kingdom," with a significant allusion to one of the immunities claimed by the Assembly in their Act 1647, was also made but not adopted. The former proposal was probably that of the highest Presbyterians, headed perhaps by the Earl of

Confession of Faith of the Presbyterian Church, but she did not declare and enact by her own authority that this is and shall be the Confession of Faith of the National Church of Scotland. No; the Church presented it to the Parliament, which 'by these presents ratify and establish the Confession of Faith *now read in their presence*, and *voted and approven by them*, as the public and avowed Confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches.' Now, after this admission on the part of the Church of its dependence on the Legislature," &c. — Robertson's Report, ii. 13.

Crawford; the latter may have been by Stair or Dalrymple. But both proposals were a great deal too extreme to be adopted.[1] The Parliament compromised the matter. The old Act of Assembly and the claims of the Church were left unnoticed, on the one hand, and unassailed; but, on the other, the Confession was ratified, deliberately ignoring the modifications insisted on by that Act.[2] The question of independence remained, as it had hitherto done, a doubtful and open one, not to be decided for a century and a half later.

But this ignoring of the Assembly of 1647 was one of the circumstances in the Act which now produced a strong feeling of resistance in the Church. And this feeling found expression in the very remarkable history attending the statutory introduction of the present subscription to the Confession of Faith.

A Church may make a Confession or declaration of its faith at any time in its history, without establishing it as a standard for the faith of its members or office-bearers. Again, it may do both these things—may issue its Confession, and afterwards hold and use it as a standard or even test—without requiring individual subscription to it. And the State, acting for the Church, may do the same. The Act of 1690 "Ratifying the Confession and Settling Church Government," cannot be said to have taken either of these additional steps. It establishes the Westminster Confession only as "the public and avowed Confession of this Church," leaving, seemingly, the use of it as a standard to that jurisdiction which was now restored to the Church; and not exacting any subscription, which indeed the Church itself

[1] See all the minutes of Parliament referred to, in the first edition of this work.

[2] "The only standard of the Church of Scotland which is now in force is the Confession of Faith as it was ratified by the Parliament of Scotland in the year 1690. . . . The difference between the Confession of Faith as ratified in Parliament 1690, and that which had been approved by the Assembly 1647, appears to consist chiefly in the omission of the explanations or qualifications contained in the Assembly's Act of Approbation."—Principal Lee's History of the Church of Scotland, ii. 366. (From Paper on the Claims of the Church of Scotland, written in 1842.)

had probably not done when it adopted it. But the Church on this point now took the initiative.[1] The Parliament had ratified the Confession in May and June 1690. The Assembly met in October, and "after mature deliberation" approved an overture, which it appointed "to have the force and strength of an Act and ordinance of Assembly," to the following effect:—

For retaining soundness and unity of doctrine, it is judged necessary that all probationers licensed to preach, all intrants into the ministry, and all other ministers and elders received into communion with us, in Church government, be obliged to subscribe their approbation of the Confession of Faith, approven by former General Assemblies of this Church, and ratified in the second session of the current Parliament; and that this be recommended to the diligence of the several presbyteries, and they appointed to record their diligence thereanent in their respective registers.

But while the Presbyterian Church had resolved to admit none who did not sign the Westminster Confession, it had by no means determined to admit all Episcopalians who should offer to do so; and on this point they were at issue with the king, who also irritated them by the calm and peremptory way in which he signified his wishes on points which they had always conceived to belong to themselves exclusively.[2] Accordingly William wrote to the Assembly of 1692, "It is represented to us that you are not a full General Assembly, there being as great a number of the ministers of the Church of Scotland as you are, who are not allowed to be represented;" and with regard to these, formerly Episcopal clergymen or curates, he says:—

We have signified our pleasure to these conform ministers to apply to you in the terms of a formula and declaratory, which we have

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[1] Except with regard to universities, colleges, and schools, as to which Parliament had on 4th July 1690 passed an Act (c. 17) providing that none should bear office in these "but such as do acknowledge and profess, and shall subscribe to the Confession of Faith, ratified and approven by this present Parliament," and also swear the oath of allegiance, &c.

[2] See his very fine letter to the Assembly of 10th October 1690, recorded in the Acts of Assembly of date 17th October.

delivered to our commissioner, being rather inclined (that this union may be the more effectual and cordial) that it should be an act of your own to receive and assume into Church government and communion with you such as shall address to you in these terms and subscribe the Confession of Faith, *which clears the soundness of their principles as to the fundamental articles of the Protestant religion.*

The Assembly remitted the curates' applications to a committee, which studiously delayed its report; and was indeed so evidently determined not to acquiesce in the king's proposal, that the Earl of Lothian, the commissioner, suddenly and with some sharpness dissolved them, without naming a day for another meeting. The moderator stood up, and requesting in his brethren's name to be heard, protested (in the words of the proviso which the Assembly's Act of 1647 had added to the Confession, and which the recent statutes had ignored) "that the office-bearers in the house of God have a spiritual intrinsic power from Jesus Christ, the only Head of the Church, to meet in Assemblies about the affairs thereof, the necessity of the same being first represented to the magistrate;" and thereupon appointed a day on the authority of the Assembly itself for its next meeting, a proposal which was carried by acclamation. The Assembly so fixed was never held; but before the day for it arrived the Act of Parliament was passed which introduced and still regulates the subscription to the Westminster Confession—an Act which had the unfortunate effect of both excluding the Episcopalians, and greatly increasing the irritation and alarm of the Presbyterian Church.

The Act "For Settling the Quiet and Peace of the Church" was passed on 12th June 1693, in the fourth session of this first Parliament of William and Mary (c. 22); and it commences with a ratification, approval, and perpetual confirmation of the still more important Statute of 1690, as to the Church's doctrine and government. It then "further" statutes and ordains—

That no person be admitted, or continued for hereafter, to be a minister or preacher within this Church, unless that he, having first

taken and subscribed the oath of allegiance, and subscribed the assurance in manner appointed by another Act of this present session of Parliament made thereanent, do also subscribe the Confession of Faith, ratified in the foresaid fifth Act of the second session of this Parliament, declaring the same to be the confession of his faith, and that he owns the doctrine therein contained to be the true doctrine which he will constantly adhere to; as likewise, that he owns and acknowledges Presbyterian Church government as settled, &c.

Unfortunately for the quiet and peace of the Church, several of the other provisions contained in this Act were very offensive to the Presbyterians, who indeed were most of all offended by the attempt to provide for the conduct of Church affairs by civil legislation at all. Thus all ministers were by it obliged to subscribe not only the Confession, but the oath of allegiance and assurance, taken to William as king not only *de facto* but *de jure*. The ministers, not seriously objecting to the substance of this oath, yet resented its being imposed upon them in their sacred capacity. The long manifesto preserved in the Life of Carstairs[1] (which, whether emanating from friends of the Church or enemies of William, was certainly intended to express and inflame the feelings of the former) treats the proposal to enforce oaths, the substance of which very few of the members rejected, as an act of unprecedented tyranny which it concerned the privileges of the Church to resist. And the same argument applied equally, or perhaps *a fortiori*, to subscription to the purely doctrinal Confession, the Act in both cases prescribing peremptorily to the Church whom it was to admit to the office of the holy ministry, and whom to exclude. But all the different objections to the Act united and culminated when it went on to provide for summoning a General Assembly by royal authority, and when, this having been done, all the members were ordered to make the subscriptions, and especially the Assurance, in terms of the statute, and that under a threat, first of being individually excluded from that court, and afterwards

[1] Carstairs State Papers and Letters, p. 52.

of its being dissolved. Scotland was once more in a religious storm. The Church was now on the old ground, so familiar to it from 1560 to 1843, of "freedom of Assembly," and the threat of a second dissolution seems to have made it resolve that on this occasion the "intrinsic power" to meet, asserted by the Church's Act of 1647, should not bend to the civil Act of 1693. The Assembly was determined, if dissolved, to continue its sittings. The king was equally firm;[1] and all authorities appear to agree that the Church was on the point of an open breach with the new monarch and his government, when the hurried irruption of Mr Carstairs into the presence of the king at Kensington, after having intercepted the royal despatches, prevented the explosion at the last moment. On the morning of the meeting of Assembly, 29th March 1694, permission came to the royal commissioner to withdraw the threat of dissolution, and relieve the members from taking the Assurance. This concession was of the greatest service to King William. A cordial feeling took possession of the Assembly at once. They persisted, indeed, in steadily ignoring the obnoxious statute; but they proceeded at once to pass an Act which carried into effect almost exactly what the statute contemplated—so far at least as subscription to the Confession was concerned. The Assembly, by this Act (11 of 1694), appointed a commission, "who may receive into ministerial communion such of the late conforming ministers as, having qualified themselves according to law, shall apply personally to them one by one, duly and orderly, and shall acknowledge, engage, and *subscribe upon the end of the Confession of Faith* as follows, viz.:—

"*I,* , *do sincerely own and declare the above*

[1] William was probably displeased with his ministers, Dalrymple or Tarbat, for passing an Act with so much stricter a subscription than he had himself proposed to the Episcopalians; and he must have been confounded when he heard that the Presbyterians, upon what he considered a mere religious punctilio, refused and resented an enactment so much more favourable to them than he had intended.

Confession of Faith, approven by former General Assemblies of this Church, and ratified by law in the year 1690, *to be the confession of my faith; and that I own the doctrine therein contained to be the true doctrine, which I will constantly adhere to; as likewise that I own and acknowledge Presbyterian Church government of this Church,*" &c. . . .

"As also the General Assembly require all presbyteries and synods, in their admitting or receiving any to ministerial communion, that they oblige them to take and subscribe the above acknowledgment;" and the Commission is authorised also to fill up vacant congregations on the north side of Tay (the Episcopal part of the kingdom), "by ordaining well-qualified expectants, who shall be bound at their entry to subscribe the said Confession of Faith, with the acknowledgment above expressed."

The words of subscription are taken from the Act of Parliament; but the Assembly took care to interpolate the clause that the Confession had been "approven by former General Assemblies of this Church"—*i.e.*, by the Assemblies held in 1647 and thereafter, which were all held without or against the royal authority, and were ignored by the recent statutes. As a farther manifesto of independence, they enjoin in the same Act that none of their judicatories "take advantage to censure any minister whatsoever for not having qualified himself in terms of the 'Act for Settling the Quiet and Peace of the Church,'" an injunction which is repeated in a separate Act (12th of this Assembly). And seemingly well aware that even these safeguards would by no means satisfy the Cameronian party (who were not only offended by the ignoring of the whole "attainments" of the covenant period, but equally so by the statutory and, as they alleged, the quasi-Erastian character of the present settlement), they add (section 8 of Act 11),—

The Assembly being informed that several aspersions are laid on the ministers and judicatories of this Church by some persons, as if the said ministers and judicatories had receded from the known principles thereof, in relation to the constitution and government of the Church,

contained in the Confession of Faith,[1] though the contrary thereof be evident, not only by the ministers of this Church their owning of and adhering to the said Confession, wherein these principles are contained, but also by the whole course of their ministry, therefore the General Assembly require the said commission to take all due pains to inform, convince, and satisfy any such persons of their mistakes, that they may be reclaimed.

Meantime, amid all these protestations of independence, the Act of 1693 was translated in 1694 into a formula of subscription; and the matter came to an end as a question between the Church and the State. It was not raised again for two hundred years, and indeed it is only within the last twelve months, and in the General Assembly of 1901, that it can be said to have come to the front. The changes made in the meantime were by the Church itself; but, until recently, they were all in the direction of making the formula more strict and exclusive. Passing over some unimportant Acts of Assembly, we take up at once the legislation of 1711. It relates only to ministers and *probationers* (*i.e.*, candidates or expectants of the ministry, who, as licensed by the presbytery to preach on probation, are also called preachers, licentiates, or probationers). Every minister must, of course, have first been a probationer, and in the Act 10 of Assembly 1711 there are, accordingly, two sets of questions to be put, to ministers and probationers respectively, and a common formula to be subscribed by both. Both sets of questions begin with a stipulation of belief in the Scriptures as "the Word of God and the only rule of faith." That for probationers proceeds—

Do you sincerely own and believe the whole doctrine of the Confession of Faith, approven by the General Assemblies of this National Church, and ratified by law in the year 1690, and frequently confirmed

[1] The reference is probably to the well-known clause of the Confession, "The Lord Jesus, as King and Head of His Church, hath therein appointed a government in the hand of church-officers, distinct from the civil magistrate."

by divers Acts of Parliament since that time,[1] to be *the truths of God*, contained in the Scriptures of the Old and New Testaments? and do you own the *whole doctrine* therein contained as the *confession of your faith?*"

And again—

Are you persuaded that the said doctrine is founded upon the Holy Scriptures, and agreeable thereto? Do you promise that, through the grace of God, you will firmly and constantly adhere to, and in your station to the utmost of your power assert, maintain, and defend the said doctrine? Do you renounce all doctrines, tenets, or opinions whatsover, contrary to or inconsistent with the said doctrine of this Church? Do you promise that you will submit yourself to the several judicatories of this Church, and are you willing to subscribe to these things?

The questions for ministers are nearly the same with those for probationers, only the "whole doctrine of the Confession" is here stated to be "founded upon the Word of God" instead of being "the truths of God;" but the personal confession and obligation is the same: some of the tenets inconsistent with the Confession are specified; and there is added a special engagement to submit to the judicatories of the Church, "and that, according to your power, you shall maintain the unity and peace of this Church against error and schism, notwithstanding of whatever trouble or persecution may arise; and that you shall follow no divisive courses from the present established doctrine . . . of this Church?" But the Formula, which is to be subscribed by all, includes all the expressions contained in *both* sets of oral questions, professing the "whole doctrine" to be "the truths of God," and also "founded on the Word of God, and agreeable thereto;" owning the Confession as the "confession of my faith," promising to "adhere to, assert, maintain, and defend it," and renouncing all doctrines "contrary to or inconsistent with" it.

[1] The Acts at the time of the Treaty of Union had intervened, of which in the next chapter.

Such was the clerical subscription in the Church of Scotland from 1711 to 1889. It is plain that the Act 1711 made a considerable change upon the subscription which had preceded it. Yet it does not appear that this was at the time held to be a very strong exercise of Church power. The Union statutes recently passed (which we consider in next chapter) had been supposed to be much in favour of the Scottish Kirk. And in any case it seemed now that the circumstances of the Church, and the attacks made upon it, called for a strong exercise of its native power. We may gather the reasons from the words of the Acts of Assembly of the time, and from Wodrow's 'Correspondence' (i. 138-151, 227). They seem to have been, first, a desire for uniformity in the procedure, as the Act itself bears; secondly, a vague but strong dread of heresy, as indicated by an Act of the immediately preceding Assembly (10 of Assembly 1710); and, thirdly, a more special fear of that Episcopalian reaction which was now beginning upon the accession of Queen Anne's last ministry, and which showed itself more clearly in the hostile legislation of the Parliament of the next year, 1712. It is plain that this device of stipulation and subscription, which has come to be felt as a restraint on those within the Church, was originally intended chiefly as a protection against those outside it. It was so, in the case both of the Scottish Confession and of that of Westminster.

But whatever were the motives for the passing of the Act, it made a serious change, and a time came when the change—long before it was reversed—was seriously questioned. The Revolution of 1688 was succeeded by a period of enlightenment combined with "a rapid and general lowering of the moral temperature of the country;" and during most of the eighteenth century the Church was under the ascendancy of the Moderate party—often the party of culture and always of common-sense. In these circumstances the Puritan Confession and the strict sub-

scription to it were felt as general grievances.[1] But it was also now maintained that the Assembly's Act of 1711 was illegal. It must be remembered that there were always two schools in the Church, one of which held a Church power of legislation in Church matters, independently of the State, and if need be against the Acts of Parliament. But the other, by this time largely represented, held that the Church's power in such matters was more properly administration than legislation, and that it must be within the limits which the civil power might from time to time fix by statutory enactment. Each party had precedents to show, in the independent action or submission of the Church in the past. It was plain that in the event of the relation of the Church to the State being once authoritatively determined, one half of these precedents would vanish. But that authoritative determination was not to happen till another century, and before dealing with it in the next chapter we must notice the Treaty of Union and its important provisions in favour of the Church.

[1] Some interesting records of this controversy in Scotland, especially in Principal Robertson's time, omitted here for want of space, will be found in the first edition of this work (1867) on p. 106 *et seq.*

CHAPTER II.

THE TREATY OF UNION, AND THE DEFINITION OF 1843.

In carrying on the constitutional and statutory history of the Church of Scotland from the Revolution Settlement, the next important point is the Union between Scotland and England. The first thing that broke down the old Scottish theory of the magistrate was the accession of the Scottish king to the English throne. The magistrate—God's lieutenant—the divinely-appointed king of a divinely-"distincted" nation—he to whom the defence of the truth "primarily" appertained—was now an English monarch and head of the English Church, and condemned, so far, to a certain official neutrality, quite inconsistent with that personal conviction which the older Scottish statutes assume. The union of the two crowns came, indeed, in a guise too flattering to our pride to be resisted; but not the less was it the first step to the lower platform of 1688 and the Disruption of 1843. But the union of the two kingdoms and the merging of the two legislatures was a still more important step. The storm of opposition which was raised in Scotland against the Union, notwithstanding the great trading advantages which it proposed, sprang very much from the conviction that the Church of the weaker nation would be certainly exposed to attacks as soon as Scotland had lost both its Parliament and its king. The consequence was a succession of the most solemn legislative guarantees in favour of the Scottish Church, its principles, and its government. And the result is, that while the legal

position of the Established Church of Scotland depends, in the first place, upon the Statutes of 1690 and 1693, it hangs perhaps equally upon the Act of Security incorporated into the Treaty of Union. For if the terms of the latter Act are somewhat less express, they are much more solemn and authoritative; and being founded on an international transaction, it claims to rest not on the strength of law alone, but on the faith of an executed treaty and an indissoluble bargain.

The Act of the Scottish Parliament appointing commissioners to treat with the commissioners of the Parliament of England about a union (Act 1705, c. 4), concludes with the provision, "That the said commissioners shall not treat of, or concerning, any alteration of the worship, discipline, and government of the Church of this kingdom as now by law established." The "Act for Securing the Protestant Religion and Presbyterian Church Government" is so very important a document that we give it in the appendix.[1] It narrates the negative provision of the previous Act which we have just mentioned, and goes on to give positive securities, declaring it "reasonable and necessary that the *true Protestant religion, as presently professed* within this kingdom, with the worship, government, and discipline of this Church, should be effectually and *unalterably* secured;" and for this purpose "her majesty, with advice and consent of the said Estates of Parliament, doth hereby establish and confirm the true Protestant religion and the worship, discipline, and government of this Church, *to continue without any alteration to the people of this land in all succeeding generations.*" The true Protestant religion may be common to England and Scotland, and to the whole of Protestant Europe, but the next clause of the enactment is more specific. In it her majesty "more especially" for ever confirms the Act 1690, c. 5, "intituled, *Act Ratifying the Confession of Faith and Settling Presbyterian Church Government*, with the haill

[1] Note I.

other Acts of Parliament relating thereto, in prosecution of the declaration of the Estates of this kingdom containing the Claim of Right." The other Acts referred to do not seem to be those mentioned *in gremio* of the Act 1690, c. 5, as being there confirmed, but rather those surrounding and following it in the Statute-book—such as that abolishing the royal supremacy in the Church,[1] and that abolishing patronages[2] (at least the Church in 1712 claimed the latter Act as covered by the clause under consideration); and probably also the Act 1693, c. 22, as to subscription. Though this last Act is separated from the one primarily confirmed by a distance of three years, it has a very close internal connection with it (commencing, indeed, with a ratification); and the remainder of the Act of Security has a curious resemblance to the provisions of 1693. At the same time, the Act of Security does not specifically mention the Act 1693; but goes on to provide that "the foresaid true Protestant religion contained in the above-mentioned Confession of Faith, with the form and purity of worship, &c., all established by the foresaid Acts of Parliament, pursuant to the Claim of Right, shall remain and continue unalterable, and that the said Presbyterian government shall be the only government of the Church within the kingdom of Scotland." The Act then goes on, still in the interest of securing religion and the Church, to the great matter of education. It provides, in remarkably express terms, for the subscription to the Confession, not of the ministers or members of the Church, but of all "professors, principals, regents, *masters* or others bearing office in any university, college, *or school*," and especially in the universities and colleges of St Andrews, Glasgow, Aberdeen, and Edinburgh, which are to "continue within this kingdom for ever;" and the professors and masters of schools are not only to subscribe the foresaid Confession "as the confession of their faith," but they are publicly to bind themselves to practise the Church worship and submit

[1] 1690, c. 1. [2] 1690, c. 23.

themselves to its government and discipline. A provision follows, that Scotland should be free for ever from any oath, test, or subscription, contrary to or inconsistent with what had been before confirmed—which was designed to guard against the introduction into this kingdom of any of the statutes protecting the English Church. Lastly, the sovereigns of Great Britain are in all time coming, on their respective accessions, to "swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion, &c., as above established by the laws of this kingdom; and this Act of Parliament, with the establishment therein contained, shall be held and observed in all times coming as a *fundamental and essential condition* of *any* treaty or union to be concluded between the two kingdoms, without any alteration thereof, or derogation thereto, *in any sort, for ever*." These provisions and sanctions, being first enacted by the Scottish sovereign and Parliament before the treaty was agreed to, are afterwards re-enacted and incorporated *verbatim* into both the Scottish and English Acts ratifying and approving the Union, each of them declaring that the Articles of Union, and this Act of the Scottish Parliament in particular, were "to be, and continue in all time coming, the sure and perpetual foundation of a complete and entire union of the two kingdoms." The solemnity of words could go no farther; and the royal sanction on the 6th of March 1707 consummated the Union on the basis of fundamental conditions not to be altered or derogated from in any sort for ever.

This quality of irrevocableness is of importance in the region of legislation rather than of law. A statute which may be repealed to-morrow is in theory as sacred to the administrators of law as one which is bound up with the roots of national existence; and the Statutes of 1690 and 1693 would probably be held equally binding by our courts without the additional sanctions of 1707. Yet those

sanctions, and the amount of deference which has been paid to them by the Legislature, have many important retroactive effects upon law; and remarking that the Creed of Scotland is the leading thing which the chief statute of the Union assures to us for ever, we may notice, in passing, some other matters in which the ecclesiastical stipulations of the Union have been already disregarded or overruled.

We have, in the first place, the group of statutes passed by the later Ministry of Queen Anne in the years 1711 and 1712; and especially the Toleration Act and the Act for the Restoration of Patronage. These two enactments are joined together in a memorial for the Church of Scotland which was presented at the time to Parliament by the venerable Principal Carstairs and the other commissioners of the Church, and was afterwards appointed by the Assembly of 1715 to be held "as the deed and mind of this Assembly."[1] The mere toleration of Episcopalian worship, or even of their voluntary church government in Scotland, is not here complained of; but rather a number of circumstances in the Act which seemed to show that the Legislature was determined to treat Presbyterian dissenters in England with much greater disfavour than they were to regard Epicopalian dissenters in Scotland,[2] and that the international fairness and equality which the Union Treaty seemed to stipulate for were thus abandoned. The higher Presbyterians, no doubt, took much stronger ground than this; and the really important parts of the Act were the open statutory deliverance of a religious sect from the

[1] Assembly 1715, Act 9.

[2] The most interesting of these for our purposes is that "in Scotland the toleration doth not restrain the disseminating the most dangerous errors, by requiring a confession of faith, or subscription to the doctrinal articles of the Established Church, as is required of dissenters in England." The Toleration Act in England (1 William and Mary, c. 18) exempted only *Protestant* dissenters from penalties on account of nonconformity, and these only on their professing their belief in the Trinity and in the Holy Scriptures, and in addition subscribing the Thirty-nine Articles (except the 34th, 38th, and 36th, and part of the 20th).

hitherto universal jurisdiction of the Established Church, and the withdrawal of all civil sanctions and penalties formerly added on to ecclesiastical censures.[1] These stronger objections are taken in another memorial from the Commission of Assembly, which was "unanimously approved and ratified" by the Assembly of 1712 (in whose minutes it is inserted of date 13th May), in which the protection of the stipulations of the Union is appealed to with great detail. And all parties in the Church of Scotland united in the opposition to the other Act, that restoring patronage[2] (10 Anne, c. 12). The first-named memorial, after stating that, in order that the legal constitution of the Church of Scotland "might be unalterably secured, it was declared to be a fundamental and essential condition of the Union," represents that "by the Act restoring the power of presentation to patrons, the legally-established constitution of this Church was altered in a very important point."[3] This protest was repeated by the General Assembly year after year to near the close of the century, but in vain; and the original design of the promoters of the bill, as stated, truly or otherwise, by Bishop Burnet,—"to weaken and undermine the establishment" of the Scottish Church,—was brought about through its means in strange and unexpected ways. The consequences were more serious than protests by the Assembly; and the statement of them by another distinguished legislator is not much exaggerated. "The British Legislature," says Lord Macaulay, "violated the Articles of Union, and made a change in the constitution of the Church of Scotland. From that change has flowed almost all the dis-

[1] It must be remembered that it was the intolerance of the Church of Scotland and the magistrates of Edinburgh towards Mr Greenshields the Episcopal minister that led the English Parliament to measures at once of defence and retaliation.

[2] Patronage had been abolished on 19th July 1690 by the same Parliament which on 7th June had ratified the Confession of Faith, and settled Presbyterian Church government. This was a concession to the urgent desire of the Church party, and quite in opposition to the wish of the new monarch.

[3] This was argued more formally and fully by the Assembly 1712.

sent now existing in Scotland. . . . Year after year the General Assembly protested against the violation, but in vain; and from the Act of 1712 undoubtedly flowed every secession and schism that has taken place in the Church of Scotland.[1] Before the last and greatest of these schisms took place, the Church of Scotland once more carried a protest to the Legislature, that this Act was in itself null and void, because contrary to the stipulations of the Treaty of Union;[2] but Parliament deliberately declined to acknowledge the protest, and the courts of law were of course still less able to do so. Nothing can show the conclusive authority of mere statute more than the deliverance of the House of Lords in the first Auchterarder case, where the question of Church right, which had been treated in the court below as an historical and constitutional one, was at once decided on the bare authority of the Act 1711, c. 12. And nothing can show the difficulties flowing from an incorporating union of two legislatures more than the result of the appeal to Parliament which followed this judicial decision. For the proposed inquiry into the "Protest" which the Church of Scotland had addressed to the "federal legislature created by the Treaty of Union," against *inter alia* a statute alleged to have been passed in 1711 "without the consent of this

[1] Lord Macaulay's speech on the Test in the Scottish Universities; Speeches, ii. 180.

[2] The General Assembly do, in name and on behalf of this Church, and of the nation and people of Scotland, and under the sanction of the several statutes, and the Treaty of Union herein-before recited, ... protest, that all and whatsoever Acts of the Parliament of Great Britain passed without the consent of this Church and nation, in alteration of, or derogation to, the aforesaid government, discipline, rights, and privileges of this Church (which were not allowed to be treated of by the commissioners for settling the terms of the Union between the two kingdoms, but were secured by antecedent stipulation, provided to be inserted, and inserted, in the Treaty of Union as an unalterable and fundamental condition thereof, and so reserved from the cognisance and power of the federal legislature created by the said treaty), as also, all and whatsoever sentences of courts in contravention of the same government, discipline, right, and privileges, are, and shall be in themselves void and null, and of no legal force or effect."—Claim of Right of the Church of Scotland, Assembly 1842.

Church and nation," supported though it was in 1843 by a majority of the members from Scotland, was rejected by a large majority of the whole House.

Yet the eighteenth-century Acts of the Tory Ministry of Queen Anne were by no means so deliberate an overruling of the provisions of the Act of Security as was the great education legislation of the nineteenth century under Victoria. The Church of Knox had a high ideal of what education, primary and university, ought to be; and one of the reasons for its desiring jurisdiction from the State over all Scotsmen was that it might regulate the education of the whole youth, and especially in the Catholic districts of the country. This educational monopoly, confirmed, as we have seen, at the Revolution and the Union, and exercised chiefly through the parish schools, was felt to be a great grievance even before 1843. But after the split of that year, the feeling of the country turned unmistakably against it, and the General Assembly had to fall back stubbornly upon mere statutory guarantees. In 1849 it issued a Protest, Declaration, and Testimony that

> The Church of Scotland is vested with rights in the matter of national education, through means of the parish schools, which, under the Revolution Settlement, Act of Security, and Treaty of Union, have been irrevocably guaranteed to her, and which the sovereign of this country binds himself, by the most solemn obligations, to maintain inviolable. The General Assembly *must ever hold that it is as much within the competency of the legislature* to abolish the Presbyterian and to re-establish the Episcopalian polity in Scotland, as to abrogate the connection between the parish schools and the Church of Scotland.[1]

The abrogation of this connection, repeatedly proposed in previous Bills, was at last carried out in the Scottish Education Act of 1872. By it the parish schools and parish teachers are put "under the management of the

[1] See also the Resolutions of the Assembly 1844, May 24; Assembly 1845, May 24; 1846, May 28; 1848, May 29; Commission of Assembly, 6th March 1850; Assembly 1851, May 31.

school board" to be elected by the parish; and "all jurisdiction, power, and authority possessed or exercised by presbyteries or other Church courts with respect to any public schools in Scotland are hereby abolished." [1]

Still more express, and of an earlier date, was the repeal of certain provisions of the Act of Security in the case of the universities in 1853. The Act of that year [2] substitutes, for the profession of faith and Church adherence imposed upon professors (other than theological [3] professors), a promise "never to endeavour, directly or indirectly, to teach or inculcate any opinions opposed to the divine authority of the holy Scriptures or to the Westminster Confession of Faith," "and not to exercise the professorial office to the prejudice or subversion of the Church of Scotland as by law established." And this statute, commencing undisguisedly with the enactment that "it shall not be necessary to make and subscribe the acknowledgment mentioned in the Act for Securing the Protestant Religion and Presbyterian Church Government," ends with the provision that "the said Act shall be, and the same is hereby repealed in so far as inconsistent with this Act, but the same shall remain in full force and effect in all other respects whatever."

These actual reversals in the reign of Victoria of the Union provisions—even more than her later speeches from the Throne which proposed the disestablishment of the Church in Scotland—suggest some general questions which must be put before passing away from the subject. Solemn and stringent as the terms of the Treaty of Union are, there are two reasons why no such treaty can ever be an absolute guarantee for all the provisions which it contains. In the first place, the right of one generation absolutely to bind

[1] 35 & 36 Vic., c. 62, sec. 23.

[2] 16 & 17 Vic., c. 89.

[3] The Act 1853 limits the words "Chairs of Theology" to "Chairs of Divinity, Church History, Biblical Criticism, and Hebrew," so that new theological chairs would not necessarily be restricted, as these (notwithstanding the recommendations of the Commission of 1889) still are.

all those that succeed it, has seldom been admitted by theorists, and more seldom by legislators, with regard to any department of human interests. And in the sphere of religion, of faith, it seems a more doubtful claim than in any other region. If the Scotland of the twentieth century should depart from the Confession of its Faith (for example) which it made at the Revolution and confirmed at the Union, is there any power in the Constitution to keep her to it? If England, breaking off from its insular religionism, should either, on the one hand, gravitate Romewards, or, on the other, once more cultivate a communion with the great family of Reformed Churches that fill America and the north of Europe, could the Union "Act for Securing the Church of England" be rightfully invoked to forbid either change? Is Parliament not entitled to do what seems to it best for the good of its people at the time, at least if the people desire it? How far is our present Legislature bound to do what seems to it inexpedient, and even wrong, because our ancestors, believing it to be right and expedient, made it a condition of the Treaty of Union that it should continually be done?—And if it be answered, that however expedient the breaking of a treaty may appear, it cannot rightfully be done so long as its fulfilment is insisted on, the question rises, in the second place, What party is there entitled to insist on the fulfilment of the Union obligations to Scotland? The unfortunate distinction of a treaty of this kind—a treaty of union or incorporation—is that in its very completeness it destroys the separate individualities whose mutual and antagonistic rights were being secured. There are no longer two parties to the contract. The nation of Scotland, which was one of the parties to the Union, by that Union lost its separate existence; and a promise is in great danger of being broken when there is no one to claim its fulfilment. In the present case there is not only one monarch and one nation, but one supreme Legislature; and the merging of the two Parliaments into one makes it

always a matter of more uncertainty whether, in point of fact, Scotland is at any particular time insisting on the fulfilment of some ancient arrangement. The representatives of Scotland have, as such, no separate constitutional standing. They have merely a numerical value in a House whose numbers twelve times exceed their own. There is no Parliament of Scotland. And whatever advantages may have been gained by the legal decisions against the Church of Scotland from 1834 to 1843, which we are about to notice, one serious result has been the crushing of the only institute that even pretended to represent the ancient independence of Scotland. The Claim of Right of 1842, by far the most important document in our modern history, had urged the original and inalienable independence of the Church of Scotland, as possessing an authority, limited, no doubt, to spiritual matters, yet co-ordinate with that of the State itself. And such a body, if such a position were conceded to it, had, of course, not only interest, but right, to represent Scotland, even against the Legislature, in all those matters affecting religion which the Act of Security reserved to the nation and the Church. According to the recent decisions, it cannot be said that the Church has now any such position; and the fact is probably much more important in its bearing upon the provisions of the Union than some of the infringements which we have mentioned. Whether the party now represented by the United Free Church is historically identical with the Church of the Revolution Settlement, is much more doubtful than Lord Macaulay chose to consider it in debate. But the fact that the Established Church has now been finally denied that position of independence which this very party had always claimed for it, is not a doubtful point; and the suppression of this ancient claim, whether it was a valid claim or not, is important for the future. As the stipulations of the Union in favour of Scotland are chiefly ecclesiastical, they would certainly be more likely to be observed "for ever," if the Church had authority to demand their fulfilment

even from the Legislature, as a matter beyond the authority of Parliament. No one imagines that this is now the case. So long, indeed, as Scotland appears to be unanimous, or nearly so, on the ground of the privileges secured by the Union, no attack can well be made upon them in the united Parliament of Great Britain. But in the event of either a need or a desire for a change on the part of Scotland being at any time demonstrated to the Legislature, it would now be impossible for the Church of Scotland to oppose it on the ground of treaty made *with it.* In such a case the Legislature would come face to face with the great moral question which underlies all the legal and constitutional ones. Can one generation bind all those that succeed it in matters of conscience, religion, and faith? Can the solemn engagements of our ancestors tie up their descendants from their permanent allegiance to truth and to God? Can the supreme power of the State be bound, absolutely and unchangeably, by *any* engagements?

These high and grave questions, which it is as necessary to put as it would be unwise to answer, may be best receded from by the following observations. I. The ecclesiastical stipulations of the Union have been in use to be confirmed annually, in communications from the monarch to the General Assembly of the Established Church, as to a body which had a right to receive these renewed assurances, and to plead the ancient engagements so confirmed. And at no time was this done more explicitly than when the alleged independence of the Church was finally denied, and its subjection to statute most clearly laid down, in the Queen's letter of 1843. II. The alleged infringements which have already taken place have not been avowed or serious attacks upon what may be held the most important aspect of the Act of Security. The Act 1690 confirms, first, the Protestant religion as held in Scotland, and, secondly, its Presbyterian Church; and the Act of Security was unquestionably chiefly intended to secure these against the Episco-

palian influence of the English Legislature. Neither the Toleration Act, nor the restoration of patronage, can be called an avowed or deliberate attack upon the Presbyterianism of that Act; and still less can the actings of the Crown, the Legislature, and the Court in 1843. And the threefold safeguard to Scotland against "Prelacy," of the Revolution Claim of Right, and the Act 1690, and the Act of Security, all confirming "the Presbyterian Church government and discipline to be the only government of Christ's Church within this kingdom," remain intact—binding the British Legislature to ignore in Scotland probably even such a simple Episcopacy as Knox was willing to tolerate, but infinitely more any conceivable Episcopacy which has not fellowship and communion with the Presbyterian Churches of the Reformation. III. The claim under the Act of Security, which is pleadable on its own behalf only by the Established Church of Scotland, is doubtless capable of being strengthened, as a claim on behalf of the people of Scotland, by the concurrence of other Scotch Presbyterian bodies; for though these are ignored by the law, they are not necessarily ignored by the Legislature. The very strong historical claim of the Free Church might thus at any time be used (could it forget the *spretæ injuria formæ*), not now to neutralise, but to corroborate with an independent strength, the claim of the Church Established against any threatened transgression of the Union securities. If this transgression were an infringement of religious freedom, the Voluntary Churches would have a right to be heard with peculiar respect; and the common claim would be exceedingly strong in anything relating to doctrine. In the Act of Security, and in all our legislation, doctrine takes precedence even of Church rights; and the same principle runs through the constitutions of all the Presbyterian Churches which fill Scotland at this day. The various branches of the Church, differing in relation to civil polity, still substantially agree in doctrine; and so long as they do so they would stand on the Union engagements against any doctrinal encroach-

ments by an English legislature with an impregnable moral strength.

We shall not be thought to have devoted too much space to the Union Treaty, for it has always been spoken of as that which permanently binds both State and Church to the Confession of Faith. That this is so with regard to the State, or how far it is so, has already been considered. The same questions might now be raised on the side of the Church also, and we might proceed to inquire whether the Church of Scotland, independent (even of statute) as it has often claimed to be, is not bound by the compact of a federal treaty? But within the recollection of the past generation the whole question of Church independence, and especially of Church relation to statute, has been examined and decided; and one undoubted result of this process is, that the Church is as effectually bound to its creed by the Acts of the Revolution—*i.e.*, by simple legislation—as it could be by any supposed compact or treaty in 1707. We may, therefore, proceed at once to these decisions, which constitute the last important chapter of the legal history of the Established Church of Scotland.

In tracing the history of the Church down to a period within the memory of our readers, we have been able to avoid the chief contests which took place on the subject of Church independence. Except for a brief period in 1694, our special interest in creed has led us away from these. Yet, while tracing the history of the Church in that interest, we have been forced again and again to remark a constant tendency in churchmen to claim an original independence of the Church upon the State—an independence not lost or compromised even by its establishment, by which indeed it was sometimes alleged to have been confirmed. That statesmen leaned to a different view was evident; but it was the interest of both parties to avoid collision. And it was not

till near the end of the third century of its existence that a question so interesting to the Church in all its relations, and among others in its relation to its creed, was fairly raised, exhaustively discussed, and finally decided, at the expense of the excision from the Establishment of that Church party which for so many ages passionately maintained the doctrine. Whether the Revolution Settlement was more favourable to the Church's claims than its previous establishment is a little difficult to say. On the one hand, the Statutes of 1690 give far less of the appearance of a *jus divinum* to the Church than those of King James I. But the Westminster Confession perhaps makes up for this by its famous assertion that "The Lord Jesus, as King and Head of His Church, hath therein appointed a government in the hand of church-officers, distinct from the civil magistrate;" and while its 23rd chapter gives large power to the magistrate *circa sacra*, it goes by no means so far in this direction as the Scottish Confession. The matter remained very equally poised, and left room for one of the greatest debates in modern jurisprudence. We shall find the legal definition of 1843 fruitful in inferences and illustrations bearing on the subject of these pages.

The occasion upon which the question arose was in every way an appropriate and adequate one. It was now the third decade of the nineteenth century. All around there was a warm wave of revolution or reform. The Catholics had been emancipated. Parliament had been reformed. The new electorate seemed to have made up its mind that in Scotland, too, there should be no exclusive Church privileges and no Church penalties. In 1833, in Edinburgh alone, 846 persons were prosecuted for a Church tax; and those imprisoned and liberated were carried in triumph to their homes. It was time for the Church established (in which for the first time for a hundred years there was now an evangelical majority) to set at least its own house in order. Accordingly in the years 1833 and 1834 the General Assembly found itself called, partly by the demands of the popu-

lation outside, partly by the pressing needs of the Church within, to several great measures of internal reform. Of the three most important, the first dealt with the question whether the pastors of the Church should be appointed by the congregation or by the land-owning patron. The resistance of the Church to patronage, which we have already seen manifested at the Revolution, and till long after the Union, dated from the very commencement of its existence; and had found expression, especially in the form of a determined opposition to *intrusion*, in both Books of Discipline.[1] Yet the rights of the "just and ancient patrons" continued to hold their place in the Statute-book, and the system, abolished by King William and restored by Queen Anne, vexed and diminished the Church of Scotland during the hundred years that followed. And when the Church at last roused itself from the selfish somnolence of the previous century, and began to covet and regain its ancient popularity, this question and two others of almost equal importance were found to lie full in front of it. It could not abolish the civil right of patronage; but in May 1834 the General Assembly passed an Act declaring, "That it is a fundamental law of this Church that no pastor shall be intruded on any congregation contrary to the will of the people." This step soon produced the inevitable results. In the Auchterarder case, "by far the most important the Court has ever been required to determine,"[2] the conduct of a presbytery in founding on this Act, and rejecting a

[1] What measure of authority is allowed to the Books of Discipline by Lord Brougham, in his speech in the Auchterarder case, is not very clear. He says, "There are two authorities in favour of the call"—the First and Second Books of Discipline. But "the First Book of Discipline is of no *legal* authority at all;" and the doctrine of the Second Book on calls "is not the law *now:* it never was the fact at any time." Yet of the second of these "authorities, as they have been *strictly* called" (so in Supplement to Report, p. 18.—The Scottish Jurist Report has it, "as they have been *strangely* called"), his Lordship says, "If I were called to a conflict with the Book of Discipline on any point of Church discipline, or upon any article of theology, I should no doubt feel great anxiety." This whole speech was delivered extempore.

[2] Lord Cockburn.

presentee who had been refused by a congregation, was found illegal; and the defence that it was a matter "subject to the jurisdiction of the Church courts" was rejected. The position being laid down by the heads of the Court that the powers of the Church were derived from and dependent upon the State, the Assembly of 1838 adopted a contrary resolution, binding the Church to "assert and at all hazards defend" the independence of the Church, and to enforce obedience to this upon its office-bearers. This led to the Strathbogie cases, where the majority of a presbytery refused to obey the Act of Assembly 1834, now declared illegal, and insisted, in the face of orders from the Assembly, upon at once ordaining a presentee as minister of a recusant congregation. The presbytery were accordingly suspended by the Church (before they were able to carry out the intrusion), but actively protected by the Court; whose powers, appealed to by parties having interest, now fell heavily in every direction upon the rebellious ecclesiastical body. Very soon, too, the other great efforts which the Church had made in the direction of legislative or constitutional reform—its attempt at Church extension on the one hand, and at reunion with returning seceders on the other—were both found incompetent by the Court. And yet they were obviously the great duties of the time for a reviving Church. Its position became especially unworkable when the *quoad sacra* and secession ministers, whom the Church had received by its own authority as equal in status and function with the ministers generally, were declared to be no members of Church courts, insomuch that their presence invalidated the acts of these judicatories. So, too, large sums of damages were now found due to parties injured by acts of presbyteries done in obedience to the "fundamental law" of non-intrusion, and even by their evading or delaying the infraction of that law. The endeavour to escape, by in each case abandoning the temporalities of the benefice, and claiming the spiritual and pastoral rights only for the Church, was met by the

principle that office-bearers of the National Church were statutory functionaries, who were bound and compellable to perform their duties as fixed by the Supreme Courts, and could not evade them by merely abandoning emoluments. The negotiations for relief from this conflict of supposed jurisdictions, by means of legislation, failed. The Church now issued the Claim, Declaration, and Protest of 1842—a most important historical document, gathering up the principles of the party now dominant, and always up to this time represented in the Church, and pointing out the minimum of freedom under which they could remain established. And in the following year the individual members commissioned to the Assembly of 1843, who adhered to the Claim,[1] seceded, declaring in a new Protest [2] that a free Assembly of the Church of Scotland could not

[1] The curious equipoise in the constitutional question was maintained with a nice justice to the last. The question whether it was a majority or a minority of members of Assembly who seceded, depends on whether the previous reception of *quoad sacra* ministers by the Church's own authority, many of whom were members, was valid. If the principles of the Church are admitted, the numerical result here is in its favour. On the other hand, even on these principles, the ministers and elders who throughout the country joined the Free Church were a minority.

Even had this been otherwise, the legal result would have been quite the same. According to some of the cases just decided, the majorities of judicatories in incompetent acts were ignored, and the minorities recognised; and the attempt of any number of ministers, however large, whether acting as individuals or as judicatories, to sever the Church of Scotland from the State, would have been simply nugatory—while on the ecclesiastical principles, on the other hand, it was only separate from the State that the Church of Scotland could now exist, or at least hold Assembly. But the Protest of 1843, and the secession, were the acts not of judicatories, but of individuals. The Claim, Declaration, and Protest of 1842 was the Act of the Assembly.

[2] These documents are interesting as illustrating *ex adverso* the principles brought out in this and the following chapter, but will be found of great importance when we come to treat in the second part of the volume of the principles of non-established Scottish Presbyterians. They are themselves, too, admirable specimens of public documents—whole centuries of history concentrated into formula. We can only print the conclusion of the Claim of Right, but give the Protest of 1843, and the short Act of Separation, in full.—See Appendix, Note K.

be held under the conditions of establishment as now fixed; and, leaving "the presently subsisting ecclesiastical Establishment," they formed themselves into a body which claimed to continue or to become the Free Church of Scotland.

It will be observed that this critical discussion turned not on a matter of doctrine, but on a question of Church order, and afterwards on the question of Church authority and independence. We shall state, therefore, (1) the general principles laid down as to the relation of the Church to the State, (2) more particular statements as to the binding force of statute, and (3) certain references which the Bench made to the Confession in *illustration* of their central argument.

I. *The Relation of the Church to the State.*

The position of the Church, as set forth in the resolution of the Assembly 1838,[1] was that "In all matters touching the doctrine, government, and discipline of this Church, her judicatories possess an exclusive jurisdiction, founded on the Word of God, 'which power ecclesiastical' (in the words of the Second Book of Discipline) 'flows immediately from God and the Mediator Jesus Christ.'"[2] This position was not fully taken up in the pleadings by the senior counsel of the Church;[3] and among the powerful minority of Judges who favoured its claims,[4] some, like Lord Cockburn, acknow-

[1] Act 14. This Act was not rescinded by the Established Assembly of 1843.

[2] The independence claimed by the Church of Scotland is stated by a very high authority to have been the same in extent with that maintained by the defenders of the "Gallican liberties" abroad, against Ultramontanes and Erastians.—Principal Cunningham's Discussions, 152.

[3] "It has been said that the Church has a divine right, independent of, and superior to, the power of Parliament. This was not argued by the counsel, and Mr Rutherfurd particularly disclaimed it. Assuredly such an argument can never be listened to here."—Lord Mackenzie in Middleton *v.* Anderson (Culsalmond case), 4 D. 1010.

[4] Lords Glenlee, Fullerton, Moncreiff, Jeffrey, Cockburn, and Ivory.

ledge fully "the great principle that the Church, as an Establishment, has no power but what the State has conferred upon it," arguing thereafter that the State had conferred, or at least acquiesced in or acknowledged, all that the Assembly now claimed. But the opinions of the minority of the Bench (abler lawyers probably than the majority), and the argument in which they upheld the constitutional recognition of the Church's independent authority by the State, have now only an historical interest.

One Judge, who voted with the majority, took up in theory an almost intermediate position. Lord Medwyn held that the Church had natively and originally the independence and authority which it claimed, and had them not from the State, but from a higher source; but that, by forming a compact with the State, this original position had been abandoned, and that now the State has right and interest to enforce obedience upon the Church of all the conditions of the contract as the courts of law shall interpret them—reserving to the Church "a rescission of the contract, and a *restitutio in integrum*, which is always within its power, however much to be deprecated." Lord Medwyn's opposition to the Church was upon the constitutional question—the question how much in point of fact the State in Scotland had (in compact) given to the Church. His general theory was rather favourable to ecclesiastical claims.[1] But this theory, like that of the Assembly, was opposed by the majority of the Court.

[1] Lord Medwyn's theory is interesting, as being very much that of English High-Churchmen, which is similar to the old Scottish doctrine, but probably essentially distinct from it. The root of the Scottish theory seems to be, that all church power is *ministerial;* that churchmen are not authorities, with a power of discretion, but *servants* of Christ; that, being servants, they have no right to do more in the Church than they are commanded to do in Scripture; but, on the other hand, they have no power to do less, or to delegate their church functions to others. The Church, therefore, on this theory, has no power to compromise or surrender its original independence even for a time. The theory, on the other hand, of Mr Gladstone (for example) assumes that it has some such power

Lord Gillies says, in the Auchterarder case:[1] "As to the alleged compact between the Church and the State, I observe in passing that it is an improper term. There can be no compact, properly speaking, between the Legislature and any other body in the State. Parliament, the King, and the three Estates of the realm are omnipotent, and incapable of making a compact, because they cannot be bound by it."[2] "In some expressions in Lord Medwyn's opinion," said the

of surrender, and that for the noblest purposes; while the retention of an ultimate right of disruption is enough to defend it from the imputation of unfaithfulness.—State in its Relations with the Church, ii. 28-35.

[1] Robertson's Report, ii. 32.

[2] How far the Judges admitted the idea of contract may be gathered from the following statement of Lord Mackenzie's in the Culsalmond case: "It is said that our commission is limited; so that, independently of the alleged exclusive jurisdiction of the Church, we are barred from judging in this case by our own inherent want of power. I do not understand that. Suppose the Church had never been established, and had no exclusive ecclesiastical jurisdiction by law, but had been an independent sect, only tolerated, like the Episcopal sect in Scotland; and then suppose that a presbytery, duly authorised by the sect, had entered into an agreement with A B, by which he agreed to build a church, and endow it; and the presbytery, duly authorised by the sect, agreed that, upon a vacancy, A B should present a qualified person, whom the presbytery agreed to ordain;—suppose, then, A B fulfilled his part, and then, on a vacancy, the presbytery refused to fulfil its part—would it ever occur to anybody that we had not authority to enforce this contract? It would be no answer to say to us, You are not ecclesiastical—you cannot ordain. The answer would be, No; and, for that reason, we decern you to do it, as you agreed to do. Just as much must we have jurisdiction, unless it can be made out that we are excluded by ecclesiastical jurisdiction, given by statute to the Church, where a right and obligation to the same effect are created *vi statuti*. In fact, patronage has, in justice, the support of contract or *quasi* contract also, as well as of statute. For Parliament, with the consent, I believe, of patrons, gave to the Presbyterians the whole Establishment; and, on a vacancy in a church, enjoined the patrons to present a qualified man to the presbytery to fill it; and that being done, Parliament bound and astricted the presbytery to ordain or admit. And of this gift of the Establishment, with its condition, the Presbyterian Church accepted, which bound her in good faith, as well as allegiance, to observe the condition, and admit the qualified presentee."—Middleton *v.* Anderson, 4 D. 1010, 1011. But that the legal ground was not good faith or contract, but allegiance, is put very expressly by Lord Mackenzie in the Auchterarder case (Report, ii. 121): "I agree with the senior counsel, that the subjection of the Assembly

Lord Justice-Clerk Hope in the Stewarton case,[1] "which appear to admit of the possibility of a proper conflict of jurisdiction between the Church courts and the supreme court of law, I cannot concur. . . . I cannot admit that an Establishment, instituted by statute, can claim or legally possess any authority from a divine source, which the State, constituting the Establishment, may not have thought fit to acknowledge as belonging to it. And, of course, I cannot admit that an Establishment can ever possess an independent jurisdiction, which can give rise to a conflict as between two separate and independent jurisdictions." In the same case,[2] the Lord President Boyle says, "There exists, in reality, no such thing as a conflict between the civil and ecclesiastical courts of a country, in which a Church is established and endowed by the State." The previous head of the Court, the Lord President Hope, was at least as emphatic on this point as his successor. In the Strathbogie case he puts it thus: "The Church courts say that they have an independent jurisdiction; but who gave them any jurisdiction? The law, and that alone, gave it; and the law defines what it has so given."[3] In the very first speech on the Auchterarder case he had put it more strongly still. "That our Saviour is the Head of the Kirk of Scotland in any *temporal*, or *legislative*, or *judicial* sense, is a position which I can dignify by no other name than absurdity. THE PARLIAMENT is the temporal head of the Church, from whose acts, and from whose acts alone, it exists as the *National* Church, and from which alone it derives all its powers."[4]

is *not owing to any contract between Church and State but simply to the supreme power of the Legislature*, which every subject of this country, and all bodies consisting of subjects of this country, must obey."

[1] Cuninghame *v.* Lainshaw, 20th January 1843. See separate 'Report of the Stewarton Case' (Thomas Clark, 1843), 53.

[2] Report, 141.

[3] 2 D. 606.

[4] Report, 310. The italics are his Lordship's. Long after, the Lord Justice-Clerk Hope, in the Stewarton case, said, "The Church of Scotland is wholly, as an Establishment, the creation of statute;" and Lord Wood, in the same case, "As an Establishment, it is the creature of statute."

That these principles were reasserted in the House of Lords cannot be said; for they were not so much asserted as *assumed* throughout the speeches of Lord Brougham, Lord Cottenham, and Lord Campbell, in the first and second Auchterarder appeals. The nearest approach to the formal discussion of them is perhaps Lord Brougham's allusion to a conflict between the House of Lords and the Church courts, which he condemned as an indecent supposition.[1] It will probably not be doubted that the doctrine that there is no "independence" of the Church, and that its jurisdiction is derived from the State, has had more authority given it by the conclusive silence of the House of Lords than by the repeated and explicit propositions which we have quoted from the Judges in the court below. We shall find the higher tribunal more express on the second head, which is a logical corollary from the first proposition, but may be held separately.

[1] "My Lords, it is indecent to suppose any such case. You might as well suppose that Doctors' Commons would refuse to attend to a prohibition from the Court of King's Bench—you might as well suppose that the Court of Session, when you remit a cause with orders to alter the judgment, would refuse to alter it. Conflict of laws and of courts is by no means unknown here. We have, unfortunately, upon the question of marriage, had a conflict dividing the Courts of the two countries for upwards of twenty-five years, in which the Court of Session have held one law, and in which your Lordships and all our English Judges have unanimously held another law. The Court of Session in Scotland has held, and still hold, two persons to be married whom your Lordships hold not to be married. But has the Court of Session ever yet, when a case, which had been adjudicated by them according to their view of the law, came up to you, and you reversed according to your opposite view of the law,—has the Court of Session ever then continued the conflict, which would then have become not a conflict of law but a conflict of persons—a conflict of courts—a conflict in which the weaker would assuredly have gone to the wall? The Court of Session never thought for one instant of refusing to obey your orders upon this matter, whereupon they entertained an opinion conflicting with your own. For this reason alone, and it is enough, I have no doubt whatever that the presbytery, when your judgment is given declaring their law to be wrong—declaring the patron's right to have been valid—will, even upon the declaratory part of the judgment, do that which is right."—Supplement to Auchterarder Report, ii. 39.

II. *The Authority of Statute over the Church.*

"Upon the statute law of Scotland," said Lord Brougham, in the first Auchterarder case, "the whole controversy must ultimately depend."[1] The *legislative power* of the Church was one of the most important topics which had been pleaded in the controversy; and though its power as to creed refers to the *potestas dogmatica*, while the Auchterarder case turned on the *potestas diatactica*, the general principle as to this legislative power being controlled by statute is applicable to both. The Lord Chancellor (Cottenham) puts it thus: "If such be the construction of the statutes, of what purpose can it be to consider the supposed legislative power of the General Assembly? For it cannot be contended that there can exist in the General Assembly any legislative power *to repeal, control, or interfere with enactments of the Legislature; so that, even if the subject-matter were found to be within the general legislative power of the General Assembly, it would be powerless as to such subject-matter, so far as it is regulated by statute.*"[2] And in illustration, his Lordship, alluding to the preamble of the Veto Act passed by the Assembly to the effect "that it is a fundamental law of the Church of Scotland that no person shall be intruded in any congregation contrary to the will of the people," and to the argument that that Act was only an arrangement to carry the ancient principle into effect, remarks, "Whether that is, or ever was, a law of the Church of Scotland, is perfectly immaterial, if *the statutes* contain enactments and confer rights inconsistent with any such principle, or with the execution of any such law." That the Church's power is absolutely limited by statute was of course also held by the courts below; and while some judges, like the Lord Justice-Clerk (Hope), illustrated this by a reference to the statutes now actually in force,[3] others referred to future or possible

[1] Supplement, 8.

[2] Ibid., 51.

[3] "Statute has specially described the species of authority given to the Established Church. Its power of government is defined in different statutes, by terms which to my mind are clear and unambiguous; and in these statutes I find no legislative power granted to the Church, placing any changes

legislation as having a similar omnipotence. In delivering the leading opinion on the Strathbogie interdict,[1] Lord Gillies states that the pretensions of the Church were "in direct contradiction to the constitutional law of Great Britain," a statement of which he then quotes from Blackstone as follows: "Parliament hath sovereign and uncontrollable authority in making, repealing, revising, and expounding of laws concerning matters of all possible denominations, ecclesiastical or temporal. . . . *It can alter the established religion of the land.*"—Blackstone, i. 156. But this leads us to present, in the third place, the direct references in these decisions to the doctrine, or confession, or creed of the Church.

III. *Illustrations from Creed.*

The principles above enounced seem to imply the authority of the civil power and of statute over the Church's creed; but as it was only gradually and in the course of a forensic struggle, every step of which was contested, that these principles were reached, so it was only by degrees that the application of them to the Confession of the Church's Faith was apprehended. Thus in the very commencement of the Auchterarder case, Lord Jeffrey, arguing in the minority on the side of the Church, makes the supposed impossibility of confining the Church to its statutory creed an argument against interfering with it in other matters.[2]

within their competency. I do not find the recognition of any general and undefined legislative power. On the contrary, I think both the Statute 1592, and the statute at the Revolution, restoring Presbytery and embodying the Confession of Faith, exclude the least pretence to such power in the Church. These statutes are framed with most jealous and deliberate caution, and I think they settle and establish the Church of Scotland within limits the most precise, and with authority expressly limited to purposes therein set forth." —Stewarton Case Report, 60.

[1] Presbytery of Strathbogie, 14th Feb. 1840, 2 D. 594.

[2] "It is provided," said his Lordship, "by the Act 1592, that all questions of *Heresy* shall be for the Church judicatures alone; and it is certain that the Confession of Faith was fixed by Act 1567 and prior Acts, as the standard of that religion which the Church was primarily ordered and

The rashness of this assumption was soon to appear; and in the same case we find Lord Medwyn again taking up what seemed to be an intermediate position, but one which practically agreed with that of the majority of the Court. It may be safely said that the illustrations in the commencement of the following paragraph are of very doubtful authority, while the latter part of it has received full subsequent confirmation.

It is true I can conceive an excess of power by the Church in a matter so purely ecclesiastical that it may not be competent for this Court to check it, and where it would be necessary to resort to the Legislature to obtain a remedy. If the General Assembly were to make an alteration in the Confession of Faith, and instead of Trinitarian articles introduce Socinian, or the Neology of Germany, and if they were to insist on their elders subscribing it before admission to that office, I think the civil court could not interfere. Again, if *jure devoluto* they were to appoint a minister to a parish, and require of him subscription to the new Confession before giving him collation, redress, I think, could not be obtained from the civil court. But as by an Act passed at the Revolution professors of universities are bound to subscribe the Confession of Faith, if the General Assembly insisted that he must subscribe the new Confession, while the professor-elect scrupled to do so, but professed his willingness to subscribe the Confession 1690, I have not the slightest doubt that we could authorise his reception by the university on his subscribing that Confession, and

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established to maintain. Nothing could, therefore, be more radically *ultra vires* than for her judicatures to desert that standard, and adopt other articles of belief and doctrine. But suppose it were to happen that the majority of the Church became heretical; and that in this state a patron who adhered to the old faith gave a presentation to one who was of the same persuasion, and that on account of that very adherence to the statutory standard he was rejected by the Presbytery and the Assembly as heretical and unsound in doctrine. *Could this Court* possibly interfere to correct this flagrant illegality and monstrous *excess of power?* although the civil interests both of patron and presentee were affected by it as directly at least as they can be said to be here. Could your Lordships take the genuine Confession of Faith in one hand and the new heretical articles in the other, call for the minutes of the examination of the presentee, and if satisfied that he was right, and his ecclesiastical judges wrong, could you declare their proceeding illegal and *ultra vires*, or ordain them forthwith to retract and admit the presentee? I take it for granted that no one will maintain the affirmative."—Report, ii. 381.

would arrive at that conclusion in a declaratory action against the Senatus, by finding that the General Assembly had exceeded their powers in making an alteration on the Confession of Faith without the authority of the State ; that it was *ultra vires* and illegal, and that the people were not bound to adopt it. Our jurisdiction in this matter would have arisen because a civil right was affected by it. Now, make the further supposition that, in proceeding to receive and admit a presentee on presentation by a patron, a presbytery, under the instructions of the General Assembly, required of the presentee subscription to the new Confession, and that the patron and presentee objected to it, the patron having presented him on the express condition that he should adhere to and preach the doctrine of the Confession 1690 ; suppose the presbytery then declined to take him on trial, and rejected him on this ground, would not the patron's right of patronage be affected by this proceeding, and would he not be entitled to seek redress from this Court against this refusal to give effect to his presentation, this invasion of his civil, and the presentee's patrimonial, right? For against any excess of power which affects the civil rights of any individual or body of men, it must not only be competent to, but the bounden duty of, the civil court, as the authorised protector of the civil and patrimonial rights of the people, to give redress. I cannot conceive that if the Church act *ultra vires*, and to the injury of a civil right, the supreme civil court of the country cannot give protection and redress against a usurpation of power, even by the Church.[1]

Lord Medwyn's idea, that there might be an excess of power in things for the matter of them so purely ecclesiastical that the Court could not check it, was not countenanced by the majority even at this early date; and the principle adopted at last, both by the Court of Session and the House of Lords, as to all statutory matters, was that most tersely put by the Lord Justice-Clerk Hope in the third Auchterarder case :—

Although the functions committed to the presbytery, and the duty to be performed, are strictly ecclesiastical, and to be exercised by them in their ecclesiastical capacity,[2] yet the obligation to perform them is statutory. Statute imposes the duty on the Church courts of the

[1] Report, 148.

[2] See Lord Gillies's remarks in the Marnoch case (Edwards *v.* Cruickshank), where the Court ordained a presbytery to receive and admit a presentee as minister of a parish. "It is said that to receive and admit requires ordination, which is a purely spiritual act," &c.—3 D. 295, Dec. 18, 1840.

Establishments. Their refusal to perform the ecclesiastical duty is a violation of a statute, *therefore* a civil wrong to the party injured,[1] *therefore* cognisable by courts of law, *therefore* a wrong for which the ecclesiastical persons are amenable to law, because there is no exemption of them from the ordinary tribunals of the country, if they do not perform the duty imposed on them by statute.[2]

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[1] This matter of civil injury is also powerfully stated by Lord Gillies, in a passage of much interest for the subject of this volume: "To maintain that the Church courts may proceed in disregard or violation of Acts of Parliament binding the clergy as well as the laity, and that there is no tribunal competent to redress the wrong in the kingdom, is absurd, since for every wrong there must be a remedy. Suppose the General Assembly were to make a law that no one should be licensed to preach or be ordained as a minister who did not sign a declaration that the repeal of the Test Act was sinful, and the admission of Roman Catholics into Parliament contrary to the law of Christ, could the Court of Session give no redress, by ordaining the presbytery to take the party upon trial, though he refused to sign such a declaration? Or, if they took the licence from a probationer, or deposed a settled minister on a similar ground, would not the Court interfere to prevent or remedy the wrong? So also, if similar declarations were required with regard to the 10th of Anne, establishing patronage, and if no minister was taken upon trial unless he disclaimed all right to the benefice except by popular call, would not the judgments of a presbytery, acting on that principle, be suspended or declared null by the Court of Session? In fact, an attempt was made to get quit of patronage in this way at the end of the sixteenth, and again at the end of the seventeenth century, but presentations were enforced by the civil court notwithstanding. The principle of non-intrusion now contended for, whether in the shape of the Veto Act, or any other shape yet proposed, is a direct attempt to repeal the 10th of Anne, and to abolish patronage by Act of Assembly. It is in vain to say that the General Assembly enacts nothing with regard to temporalities or benefices, by which they mean the stipend, manse, and glebe. In the case of deposition, they deprive a minister of those advantages, and he cannot get them unless their sentence is declared null; but, laying these out of view, it is a grievous civil injury to disqualify a probationer from entering the Church by withholding his licence, and to affix a stigma to his character for doing what the law enjoins, or for not doing what it prohibits. It is still worse to extrude a minister from the Church for the same cause, and to disable him from exercising the civil jurisdiction which law has given the Church courts in several departments with regard to manses, glebes, schoolmasters, &c." — 2 D. 593, 594.

[2] Kinnoull *v.* Ferguson, March 10, 1843; 5 D. 1010. The Reports do not give the views of the Bench in this case; but the Lord Justice-Clerk's statement will be found on page 5 of the Opinions of the Consulted Judges in the Session Papers.

The possibility of the application of this principle to a statutory Confession is clear; but in the many cases decided, the references to the Church's relation to its creed were few. Both parties felt it an awkward subject. The judges favourable to the Church scarcely ventured to claim for it the right of changing the national creed; while the majority felt that, "if there was one thing more than another within the exclusive cognisance and jurisdiction of the Church, it would seem"[1] to be that creed. Gradually, however, especially after the House of Lords' judgments, the principles of the supremacy of civil statute, and the right of all parties to enforce obedience to it who have any patrimonial interest, came to bear fruit. In the case of Cruickshank *v.* Gordon,[2] where the long debate ran itself down to some of its deepest roots, about two months before the disruption of the Church, the Court sustained their right to reduce (*i.e.*, annul) a sentence of deposition of the Strathbogie ministers. And this high reach of jurisdiction was accompanied by a reference to their right to interfere with the equally remote and ecclesiastical region of doctrine. Lord Medwyn's opinion now is clearer than it was in 1838: "I presume it will not be alleged that the General Assembly could at their own hand alter the Confession of Faith, strike out all the Trinitarian articles, and substitute a Socinian one; or introduce Mormonism, or even Arminianism, in place of Calvinism."[3] The Ordinary (Lord Cuninghame), when alluding, in the note to his judgment, to the Assembly's having deposed the Strathbogie ministers for obeying the law, says:—

> The case appears to be the same as if the General Assembly, taking their own view of the Act establishing Presbytery, had commanded their presbyteries, in admitting candidates for the ministry, to leave out the 23rd chapter of the Confession of Faith in the copy submitted for subscription, or, in giving licence and induction to ministers, to

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[1] The Lord President in Auchterarder case; Report, 13.

[2] March 10, 1843; 5 D. 909.

[3] 5 D. 938.

omit the administration of the oath of allegiance, as expressly required by another statute, because these enactments were obnoxious to the present majority of the Church. If the General Assembly had deposed any of their brethren for disregarding such a mandate, it is not thought that they would have been making, in any respect, a more extreme stretch of incompetent power than is set forth in the libel now under discussion.[1]

And lastly, the Lord President (Boyle), formerly the Lord Justice-Clerk, says:—

Can it be pretended that if a majority of the General Assembly were to take upon themselves to alter the Confession of Faith, on which the Established Church is founded, and depose as for heresy all those ministers who refused to subscribe to their new creed, that such depositions are to be held unimpeachable, and carried into full effect by this Court? Or suppose that the General Assembly (as was recently done by that body in regard to an elder from Kilmarnock in regard to an ecclesiastical offence) was in its wisdom now to bring a charge against the late venerable head of this Court, and depose him from the

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[1] 5 D. 917. Lord Cuninghame adds, in a subsequent paragraph: "In so far as the Church claim the station and privileges of a supreme Legislature, the pretension is essentially unfounded. In the words of Erskine, they derive their whole powers from the State, through the Acts of the civil Legislature. It was by Act of Parliament that a change from the ancient Catholic faith to the Protestant creed was authorised; by the same authority the Confessions of the new faith were from time to time sanctioned and enforced, and the judicial powers of the Church in spiritual matters were also defined by Act of Parliament. The Church, then (as an Establishment), is in the situation of an important corporation, embodied by the State, with no powers of general legislation, but with an unquestionable right, like other corporations, to make by-laws—not to alter or repeal, but to enforce and promote the objects of their institution, in so far only, however, as these may be consistent with the provisions of the statutes under which they are constituted. If, however, under the form or disguise of such by-laws, they trench upon a single Act of the civil Legislature (as in the case of the Veto Act), the operation of the regulation may be at once corrected by a declarator of its nullity before the Supreme Court. Thus, if the General Assembly, as an assumed Legislature, passed an Act declaring that every candidate for orders, and every intending communicant, who did not profess non-intrusion principles, should be held guilty of heresy and punished accordingly, there can be no doubt that a law so incompetent would be at once declared illegal, and contrary to the statutes."—5 D. 919, 920.

office of eldership, the duties of which he has so long and honourably fulfilled, on the mere ground that his opinions, formerly delivered from this chair in certain causes, amounted to a denial of the sacred Headship of the Church, and a violation of its constitution, could it seriously be maintained by any sane man that such a sentence could not be suspended and reduced *in toto?*

These principles and illustrations bring out a result much more definite than the well-known statement of Mr Erskine in his Institutes, though quite in accordance with it: "By the present Establishment our General Assemblies or convocations of the clergy may define or explain articles of faith, condemn heretical opinions, and make canons for the better establishment of the government and discipline of the Church, *provided* their resolutions be consistent with the laws of the realm, from which our National Church derives its whole authority." [1] More than this has now been ascertained. The jurisdiction of the Church in doctrine is now within the limits set by the Statutes of 1690 and 1693; and being derived from the supreme authority of the State, any excess in the exercise of it is held to be capable of rectification.

At the time the above illustrations as to the Confession of Faith were uttered on the Bench, the Church party

[1] Erskine's Institutes of the Law of Scotland, 1. 5. 24. Upon this the Lord President remarks in the Stewarton case (Report, 137): "In thus referring to the laws and statutes of the realm, as the source of the authority of the Church, this learned author was indeed asserting only what is in truth evinced by the whole history of the Reformation, and the completion of the establishment of our National Church. For it is always carefully to be recollected, that when the Reformed Church was established in Scotland, it was not by an alliance being entered into between the Estates of Parliament and a known existing Church, as if wholly independent of each other, and based on treaties, the exposition of which might depend on the understanding of the different parties to them. On the contrary, after the Papal establishment was swept away by the Act of the Convention of Estates declaring it to be idolatrous, and never afterwards to be kept up to any extent, the Estates agreed to sanction a new form of religion, which, from the very first moment, received the impress of the authority of the Legislature, by its agreeing to and adopting the first Confession of Faith, and placing it on the Statute-book."

was in the throes of its dissolution from the Establishment, and not disposed to meet arguments drawn from the remoter field of doctrine, even had it been able to do so. But in the Catechism of the Principles and Constitution of the Free Church, issued a few years after 1843 under the authority of its Assembly,[1] the challenge as to creed is taken up, and the counter-principle very deliberately enounced. It is laid down there that Christ is the Head of the Church; that His Word is its ultimate standard; and that the principle of his Headship "is violated *when a Church is tied to its Confession by civil enactments*"—a doctrine which is immediately explained, in perfect accordance with the principles of this section of the Church in ancient and modern times, as follows: "It is one thing for the civil privileges and endowments of a Church to be tied to a Confession by civil enactments, and quite another thing for a Church itself to be so. In the former case, the Church, when she finds that any articles of her Confession are unscriptural, is at liberty to renounce them, being only bound, if she do, to resign her temporalities. In the latter case, the law allows no relief whatever to the Church, in her corporate capacity, when she discovers errors in her Confession; which, of course, is as much as to say that the Church is bound always to go absolutely upon the supposition of its soundness, and to interpret the Word of God agreeably to its declarations. Under these circumstances, the supreme and ultimate standard of doctrine is not the Bible, but the Confession of Faith."[2] The only answer that it seems possible to make to this vigorous statement is, that though "*the law* allows no relief whatever to the Church" in the case supposed, legislation may do so; and that the Confession is not the "ultimate

[1] The General Assembly of the Free Church of 1847 took up this Catechism, and "approve generally of the same, as containing a valuable summary of this Church's history, and exhibition of her distinctive principles, from the beginning of the Reformation to the present time." It is a very able, but intensely polemical, little volume.

[2] Catechism, p. 18.

standard" of truth to the Legislature, whatever it may be to the ecclesiastical body under it. The *reductio ad absurdum* is based wholly on the old theory of the Church of Scotland being an independent and originally separate body—an idea which, as we have seen, was repeatedly and emphatically rejected on the Scottish Bench, and was anything but favoured in the House of Lords. And it is only upon this theory that the "Church as a corporate body" can expect to become free from established law by the mere process of "resigning her temporalities." Lord Medwyn's opinion, that the Church could resort to this remedy at any time by a simple "rescission of the contract," seems to have fallen with the theory of compact on which it was founded, and with the doctrine of original independence on which alone the theory of compact rests. This came out more clearly towards the close. It had been already laid down that the individual minister or presbytery, while remaining in the Church of Scotland, could not, under that Church's sanction, abandon the temporalities, and so be free from statute in spiritual and pastoral matters;[1] and the principle seemed to imply that the

[1] In the House of Lords, in the second Auchterarder case (Kinnoull *v.* Ferguson, 11th July 1842, where the action of damages by the patron and presentee against the presbytery was sustained), Lord Campbell said: "The doctrine has been hinted at by the counsel for the appellants, rather than explicitly announced, that the spiritual office of minister of a parish in Scotland may be entirely separated from the temporalities, and that the Church renouncing the temporalities may dispose of the spiritual office as they please. To this doctrine I, for one, beg leave to express my dissent. By the law of the land, in framing which the Church was a party, the temporalities are united to the spiritual office, and this office with the temporalities is to be enjoyed by the person duly qualified presented by the patron, the Church being the sole judges of his qualifications. There is a civil right to this office, which the civil courts will recognise and vindicate. A renunciation of the temporalities of the Church, with a view to retain spiritual jurisdiction, cannot be made by those who continue members of the Establishment." And he adds: "While the appellants remain members of the Establishment, they are, in addition to their sacred character, public functionaries appointed and paid by the State, and they must perform the duties which the law of the land imposes upon them."—Report, 70-73.

Church itself, or its majority, was equally powerless to do so. It was now decided, not only that the acts of majorities of Church courts refusing to obey the law were invalid, but that the acts of the minorities obeying it should be valid and sufficient.[1] And so when the Claim, Declaration, and Protest of 1842 pledged the Church (not, to rescind the compact, for the Scottish Church theory never acknowledged that a compact affecting proper ecclesiastical functions could competently be made by it, but) to abandon the temporalities of the Establishment as its conditions were now fixed, and when the Protesters of 1843 claimed to be the Church of Scotland stripped of its temporalities, the Crown at this crisis threw its authority into the constitutional doctrine which its supreme courts in Scotland had for years consistently maintained. The Queen's letter to the General Assembly of 1843 declares:—

"The Act ratifying the Confession of Faith and settling Presbyterian Church government in Scotland was adopted at the Union, and is now the Act of the British Parliament. The settlement thus fixed cannot be annulled by the will or declaration of *any number* of individuals. Those who are dissatisfied with the terms of this settlement, may renounce it for themselves; but the *union of the Church of Scotland with the State is indissoluble* while the statutes remain unrepealed which recognise the Presbyterian Church as the Church established by law within the kingdom of Scotland."

The royal hands thus laid the topstone on the legal doctrine so laboriously built up. The more these memorable

[1] This was the third Auchterarder case (Kinnoull *v.* Ferguson, 10th March 1843), where "the majority of a presbytery having refused to take a presentee on trial, though the Court had found that it was not within their competency to refuse, held that an action at the instance of the patron and presentee, concluding to have it declared that the proceedings of the minority of the presbytery, who were willing to obey the law, should be valid and sufficient in the matter, and for interdict against the interference of the majority, was competent."

decisions are studied,[1] the more does it appear that a real definition, disruption, and separation has by them been effected between the two principles that struggled for centuries in the womb of Scottish history. The Nationalism of Knox might mean either of two very different theories. He was scarcely in his grave when the struggle between the two began; and perhaps the strangest thing of all is that it was not till 1843 that it was decided that it did *not* mean merely the recognition by the State of an independent Church of Scotland, possessing, by divine appointment, an

[1] The decisions form one compacted and solid body of law, the most important delivered on any one subject since the institution of the Court. They are to be found in the authorised reports as follows (the first two and the last having been so bulky as to require separate publication):—

The first Auchterarder case (Robertson's Report, 2 vols.) decided on 27th Feb., &c., 1838, that a presbytery rejecting a presentee, in obedience to the Veto Act, did so illegally, in violation of duty, and against the statutes. It was affirmed by the House of Lords on 3rd May 1839; and was followed by

The Lethendy case (Robertson's Report), where the presbytery was interdicted on 14th June 1839 from following out the same Act.

The first and second Strathbogie cases in 1840, in the first of which (2 Dunlop, 585) a presbytery which proposed to disobey the Veto Act (now declared illegal) and to ordain the vetoed presentee, having been suspended by the Church, the Court suspended that Church sentence, and interdicted its being acted on; and, in the second of which (3 Dunlop, 282) the Court ordained that presbytery "to admit and receive as minister" the vetoed presentee.

The second Auchterarder case (3 Dunlop, 778), in which the presbytery, which had been found in the first to have acted illegally, was now found in 1841 liable to the patron and presentee in damages,—a judgment affirmed by the House of Lords in 1842.

The Culsalmond case (4 Dunlop, 957), where the Commission of Assembly having ecclesiastically interdicted a presentee, settled contrary to the Veto Act, from officiating in the meantime, the Court suspended their finding, and interdicted its being carried out (10th March 1842).

The third Strathbogie case (5 Dunlop, 909), in which the Court on 10th March 1843 *reduced* a sentence of deposition of members of the presbytery of Strathbogie passed upon them by the Assembly on account of their having disregarded its Veto Act; and (next day)

The third Auchterarder case (5 Dunlop, 1010), in which the Court held that the minority of the presbytery "who were willing to obey the law" against the Church Veto Act, should be competent to hold presbytery meetings for that purpose, and interdicted the majority from opposing.

The Stewarton case (Report by Bell and Others, 20th Jan. 1843), where

exclusive jurisdiction in spiritual matters. These decisions *tend* at least to a nationalism of quite another kind—not now the casual coincidence of two independent bodies, the temporary concordat of two equal powers; but rather, the indissoluble connection of a religious function of the State with the State itself; or, perhaps, the dependence of the noblest institute of the State upon that national power which gives it existence and authority. Knox was not content to have a Church of Christ in Scotland—he was determined to have it a Church *of* Scotland. The State allowed the change, but has added its own interpretation—declaring it to be *its* Church, finally and inseparably; and Knox's descendants have found, what that great man strove not to see, that a Church with both independence and nationality, to him the most beautiful of all things, may at any moment be found to be practically impossible. The shining of that devout "Imagination" has fascinated the eyes of many generations in Scotland, but will do so no more.

What was settled in the ten years before 1843 was, as we have seen, the general relation of Church and State in

the Court, *inter alia*, interdicted the presbytery of Irvine from receiving the chapel minister as a member of presbytery as directed by the Act of 1834.

Of the nine cases, the eight first mentioned form a complete sequence, being all occasioned by Patronage questions and the Veto Act. The Stewarton case alone has to do with the Chapel Act of 1834; but, as raising the general power to legislate, it was dealt with as "one of the most important constitutional questions ever submitted to the Court," and decided after "the most anxious and deliberate consideration that could be bestowed on any case."

An equally useful distinction between the cases is suggested by the dictum of Lord Wood in the Stewarton case (p. 73), that the Court has a twofold duty, to "declare what the Church is bound to do, and enforce performance, and what it is bound not to do, and enforce the restriction." This whole law of 1843 may be summed up under these two heads of obedience: the first, of positive obedience, containing the three Auchterarder cases and the second Strathbogie case; and the other of negative obedience, containing the Lethendy and Culsalmond cases, the first and third Strathbogie cases, and the separate case of Stewarton.

Scotland rather than the particular relation of the ecclesiastical and civil courts. That is, it was the autonomy or independence of the Church itself, much more than the jurisdiction of its tribunals, which was assailed on the one hand and denied on the other. The jurisdiction of the Church courts indeed, and even their exclusive jurisdiction in all ordinary Church cases, was incessantly affirmed on the Bench even in the most hostile of these judgments,[1] and may be said never to have been in question in Scotland. It was not on the point of jurisdiction that the great question originated. It was initiated by the legislative action of the Church—by legislation which at the time seemed necessary (for the expansion, or the reunion, or even the internal cohesion, of the body), but which certainly made a great change in existing Church relations and Church rights, and was thus declared illegal. It was therefore *autonomy*, in the strict sense of the word, which was denied to the Church; and if the Church had acquiesced in that denial, it would not have been necessary for the law to go farther.

So much was this the case, that in the earlier part of the conflict, and down to what was known as its second stage, there was an expectation on the side of the Church that its threatened self-disestablishment might be thus averted. There was no chance, indeed, that the general doctrine as to the legislative subjection of the Church to Parliament, affirmed in Scotland by a Scottish court, would be then

[1] In the leading opinion, for example, in the first Strathbogie case: "There are many instances in the law of Scotland where a final and independent jurisdiction is given to a court in certain departments, and where review is excluded. . . . And so, in spiritual courts, a limited jurisdiction exists, and their proceedings cannot be reviewed and set aside in the civil court, unless there be excess of power committed by them."—2 Dunlop 591. See also Robertson's Auchterarder Case, ii. 38 (H.L.); Lethendy Case, 68; 3 D. 703 (H.L.); 4 D. 982; 5 D. 917, 923, 924; Third Auchterarder Case, Session Papers, Opinions, p. 6. And so Sir Robert Peel summed up in addressing the House of Commons, "We all admit that to the Church belongs the exclusive jurisdiction in ecclesiastical matters."

reversed in England either by Parliament or the House of Lords. But the Scottish court which had affirmed that doctrine seemed in the same breath to concede exclusive jurisdiction to the Church in spiritual matters. Might the Church not take its stand upon the exclusive jurisdiction (carefully restricting it to properly Church matters), and content itself with a general declaration against the Church and State doctrine, in the hope that even if that doctrine were not reversed, it might not be at once forced upon its acceptance? The first step to this was the recording of the counter position of the Church, which was done by the General Assembly of 1838 in the following terms:—

> The General Assembly of the Church of Scotland, while they unqualifiedly acknowledge the exclusive jurisdiction of the civil courts in regard to the civil rights and emoluments secured by law to the Church and ministers thereof, and will ever give and inculcate implicit obedience to their decisions thereanent, do resolve, that as is declared in the Confession of Faith of this National Established Church, "The Lord Jesus, as King and Head of His Church, has therein appointed a government in the hands of Church officers, distinct from the civil magistrate," and that in all matters touching the doctrine, government, and discipline of this Church, her judicatories possess an exclusive jurisdiction founded on the Word of God,

and which, they go on to add, flows only from the Church's Head, and which the Church must and will enforce.

Had the Church been allowed to stand passively on this protest (say, by the House of Commons following the vote of the Scottish members on their motion for inquiry in March 1843) there might have resulted the strange spectacle—strange, yet by no means unexampled in European history—of the civil courts and the Church courts maintaining opposite theories, and each carrying out its own theory within its own domain. Such a situation could scarcely be a very prolonged one: yet it had been again and again repeated in Scotland. But it was not now to arise. Even in this Act of Assembly the self-government of the Church is made the foundation and measure of its

jurisdiction; while the judges persistently announced that the Church had no jurisdiction except what is derived from the Crown.[1] It was a short step from this to "interdict" or "suspend," or "reduce" all judicial acts, however purely ecclesiastical, which the Crown had not authorised; and in the Lethendy and subsequent cases this was done, and submission to these decisions by the Church was made the test of establishment. Yet now, as before, the exclusive jurisdiction of the Church, in so far as that jurisdiction was admitted to depend on the civil power, was carefully maintained.

And in the closing year this test was brought to a point on both sides. On the side of the Church, the Claim of Right of 1842 and the Protest of 1843 are documents belonging wholly to the second stage of the conflict. Accordingly they make no reference to the fundamental doctrine on Church and State announced by the civil court —not even to complain of it or protest against it. On

[1] "Who gave them any jurisdiction? The law and that alone gave it; and the law defines what it has so given." This was by the head of the Court in the first Strathbogie case. But in the Culsalmond case, chiefly on the question "whether jurisdiction had been conferred on the Church by recognition as well as grant," the opinions of the Judges, extending to seventy-two pages of print, point out that to concede this unconditionally would be fatal (4 Dunlop, 982). Indeed the rejection of the "co-ordinate jurisdiction" or "independent jurisdiction" is found in all the decisions, though perhaps most emphatically and redundantly in the Stewarton case. Thus the Lord Justice-Clerk puts it there: "I cannot admit that an establishment instituted by statute, can claim or legally possess any authority from a divine source, which the State, constituting the establishment, may not have thought fit to acknowledge as belonging to it. And, of course, I cannot admit that an establishment can ever possess an independent jurisdiction, which can give rise to a conflict as between two separate and independent jurisdictions."—Page 53. And the Lord President, on p. 53, sums up a hundred pages of argument against a jurisdiction which "not being *derived* from the Crown, cannot be subjected to the control of the judgments of the courts." And finally, in the third Strathbogie case, he accepts as "the true state of the law" the view that "the claim of co-ordinate jurisdiction by the Church is incompatible with the existence of an ecclesiastical establishment."—5 D.

that matter they are content to rest upon the counter-proclamation of the opposite doctrine by the Church itself. They avoid, too, the risky claim (for a Church in establishment) of a true autonomy, and indeed of any legislative functions. What they do address themselves to — what they point out as needing to be immediately met—is the demand that the Church should carry out the views of the civil courts in the region of its native jurisdiction. Were this demand waived, the general question between Church and State would have been—not settled by any means, but at least open for settlement; while, if not waived, it left no resource but separation from the State. The Church documents of 1842-43, therefore, admirable as they are,[1] do not deal with the general question of the Scottish Church and State. They point out rather the *minimum* under which the Church could accept an interim establishment,[2] while the general question, already broadly raised with the State, should be deliberately discussed.

But the minimum—the practical question of exercising jurisdiction by courts—had been proclaimed by both parties as the test of the general position held by the Church itself. If the Church was right in the autonomy which it first acted upon and in 1838 proclaimed, then all the interdicts enumerated in 1842 were encroachments on its native and proper and habitual jurisdiction. If the Court was

[1] "I admire your Claim of Right as much as you do. It is the great boast of the Free Church that it has never been answered. As an argument on constitutional law, with the exception of a few paragraphs, I believe it to be unanswerable."—The Duke of Argyll to the author, 1874. I may add what Lord Cockburn says of its draftsman, Alexander Murray Dunlop: "Dunlop is the purest of enthusiasts. A crust of bread and a cup of cold water would satisfy all the worldly desires of this most disinterested person. His luxury would be in his obtaining justice for his favourite and oppressed Church. There cannot be a more benevolent or honourable gentleman. Any of his opponents who are candid might safely trust the explanations of their statements or views, in their absence, to the impartiality of Dunlop."—Journal by Henry Cockburn, i. 326.

[2] "Whereas, pending the efforts of the Church to accomplish the desired alteration of the law, the Court of Session . . . have, in numerous and repeated instances," &c.—Claim, Declaration, and Protest of 1842.

right in the subjection of the Church to the law as laid down in the Auchterarder case, then (but then only) all these "encroachments" were probably mere necessary enforcements of the limits which the State had originally laid down. And this twofold consequence—the one thing on which *both* sides were generally agreed in Scotland—became naturally the answer which Scotland received. Obedience *ante omnia*—before any legislation or even inquiry—was now demanded on the part of the Ministers of the Crown, backed in March 1843 by a majority of the House of Commons. Sir Robert Peel, in advising the House, made it clear that there was no intention of interfering with the exclusive jurisdiction of the Church in ordinary cases—in any case indeed except where a claim to self-government or legislation was involved. But when a doubt was raised the civil law must not only decide for the Church but carry its decree into effect. Lord Campbell, in the House of Lords' decision of the previous year, had compressed the real origin of the great legal debate into one sentence. "It is only a voluntary body, such as the Relief or Burgher Church in Scotland, that can say they will be entirely governed by their own rules." In this ruling he had followed the head of the Scottish Bench,[1] and the Prime Minister now expanded it as the ultimate ground why the Scottish courts should be supported by the Legislature.

There is a complete distinction between a Church that is voluntary and independent, and one that is established by the State. Take the case of the Roman Catholics, or any of the Protestant Dissenters in this country who are not connected with the State by way of establishment, their right, so far as voluntary jurisdiction is concerned, is

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[1] The Lord President says in the second Auchterarder case (3 D. 697): "If these gentlemen wish to maintain the situation of what they call a Christian Church, they would be no better off than the Catholic Church, or the Episcopal Church, or the Burghers, or the anti-Burghers; but when they come to call themselves the Established Church—the Church of Scotland—what makes the Church of Scotland but the law? . . . They are the Church of Scotland only so far as the law has established their Church."

quite supreme, and we do not attempt to interfere with it. Those who choose to submit to it, in consequence of their connection with any such denomination, have a perfect right to do so; but if a Church chooses to have the advantages of an establishment, and to hold those privileges which the law confers, that Church, whether it be the Church of Rome, or the Church of England, or the Presbyterian Church of Scotland, must conform to the law. It is a perfect anomaly and absurd that a Church should have all the advantages of an establishment—I do not speak merely of the stipends, but of all the privileges which a connection with the State bestows—and yet claim an exemption from those obligations which, wherever there is an establishment, must exist on its side with reference to the supreme tribunals of the country. (*Hansard* for 8th March 1843.)

Sir Robert Peel's denial of autonomy or self-government to the Church of Scotland was not gratuitous. That was at the foundation of its claim. The Prime Minister was therefore perhaps justified in advising the House that if it was clear on the matter of principle it should support the judges, and refuse even an inquiry. At the same time, it was a momentous decision: the decision whether the legislature of a church is to be inside or outside of it, always is. Yet at the moment, the concrete conflict of jurisdictions (being the practical question for individual churchmen) obscured somewhat in the minds of Scotsmen the more general issue; as the same general issue is sometimes obscured for Englishmen by details of sacrament or ritual. Nor did this confusion quite come to an end on the 18th of May 1843. Farther on in the century we shall still find an exaggerated sensitiveness on the minor matter of jurisdiction, in the mind both of lawyers and churchmen, and in relation to the churches outside establishment as well as to the church within.

CHAPTER III.

THE SIXTY YEARS SINCE 1843.

THE promise of 1843 has, on the whole, been faithfully kept on both sides. On the one hand, the assurance of the law and the Crown—that if the Church confined itself to its statutory jurisdiction, that jurisdiction would be respected by them—has been during the remainder of the century absolutely fulfilled. On the other, the Church has maintained its administrative peace, unbroken by renewed action on a legislative or constitutional scale, and it has obtained more in some directions from parliamentary enactment than it was permitted to gain before 1843 by experiments in self-government. It is only within the last five years that the Assembly has again broadly raised the question of 1843, with reference on the one hand to its jurisdiction and patrimonial rights, and on the other to subscription and creed.

All this makes it possible to comprise, in one chapter, the relations of the Church of Scotland to both the law and the State during the long period of sixty years.

The Assembly of 1843, on the first Monday after the Protesters had left in order to inaugurate the Free Church, set itself to deal with the question proposed to it by the civil courts. And it commenced, appropriately, with matters of legislation. It was expected that it would repeal the rash Veto Act of 1834, perhaps sending the repealing Act down

to be passed in usual form through presbyteries, as the original measure had been. But such formal repealing might seem to imply that the Act repealed had been a real, though mistaken, act of legislation. And after discussion, in which the new leaders of the House made it clear that the whole mass of legal decisions implied the opposite view, it was agreed unanimously "that presbyteries proceed henceforth in the settlement of parishes according to the practice which prevailed previously to the passing of that Act." The same point came up on the following day, when the Act of Assembly of 1833 admitting ministers of parliamentary churches, the Act of 1834 admitting ministers of chapels of ease, and the Act of 1839 admitting returned ministers of the Associate Synod, to full rights in presbytery, were all dealt with. Lord Belhaven proposed that the Acts be rescinded. But mere "rescinding" might imply previous validity; and after very serious discussion it was resolved to rescind them as "having been incompetently passed." More difficulty was felt with the sentences of deposition or suspension and otherwise, which no doubt followed upon the incompetent legislation, but had been done in sacred ecclesiastical forms; and it was earnestly pleaded that these, at least, should be ecclesiastically reversed. But the Moderate leaders persisted, and their motion, that these Church Acts also "were *ab initio* null and void," was carried by 148 to 33.

Nothing could be more in accordance with the civil law than these Assembly utterances. Many members would have preferred that they had been less obviously so. Lord Brougham, fresh from Queen Victoria's coronation, declared that once the law had been laid down, all the utterances of the Assembly and the Church with regard to it were of no more consequence than "the recalcitration of the champion's horse, when he is backed out of Westminster Hall!" But no Assembly of representative Scotsmen would acquiesce in so offensive a suggestion; and the revulsion became more manifest when the House on 24th May

1843, urged by Dr Cook, leader of the Moderate party, took up its next task—to deal with the Free Church Protest. Three forms of answer were proposed, but not approved; and the House found that "in questions involving important points of jurisdiction, the bearing of the various judgments which have been recently pronounced by the civil courts in the numerous cases that have arisen from the illegal maintenance, on the part of the Church, of the Act on calls, and of the Act with reference to parliamentary and *quoad sacra* churches, should be very carefully and maturely considered;" and they accordingly appointed a strong committee to report to the August Commission. The result would have been interesting to lawyers, if not important to the law. But though the committee was unanimous, and laid the report on the table of a crowded commission,[1] which at once fixed an hour for its consideration, it was at the same time arranged that there should be no quorum at that hour, and that the whole project of an answer should be dropped. The details of this matter, which have only recently been given to the world,[2] indicate that the Government of Sir Robert Peel used its influence against any public answer being attempted, and indeed had some fear of another disruption being the result. But it is also clear that since the crash in May the feeling in favour of spiritual independence within the establishment had rapidly increased, and that not merely among the few who had in recent years voted with the majority but remained in, or with the few

[1] "Although the committee was appointed, they never gave in a report." — The Church of Scotland, Past and Present, iii. 833. This is a strange mistake: see Assembly Acts, Com., 9th Aug., sess. 2.

[2] The chairman of the committee was Mr Milne-Home, who was also Depute under the new Lord Advocate (M'Neill), and his letter to his chief in London, written the day after the Commission, has been (very irregularly) published in his biography. It mentions the result to which things had been so far brought, and that it was also arranged not to let the public see the report already on the table till at least next Assembly, if even then. It no doubt still exists somewhere. See "Secret of the Unanswered Protest," 'United Presb. Magazine,' Feb. 1898.

others who during the same years had attempted an intermediate position.[1] The Moderate leaders had already lost — probably for ever — the chance of the General Assembly of the Church of Scotland uttering for itself the same law which had been laid down for it by the courts of the realm. Passive acquiescence and obedience was the utmost that could in such a case be reasonably expected.

And the Government had already commenced in Parliament to implement its share in the transaction. Lord Aberdeen introduced the Benefices Bill of 1843,[2] by which the congregation was allowed, not a *veto* on the presentee but a right to state general objections before the presbytery, while the presbytery was empowered to judge of them, having regard not only to "the whole circumstances of the parish," but to "the spiritual welfare and edification of the congregation," and even to "the *number* and character of the objectors." It thus gave, if not a *liberum arbitrium* to the congregation, a *liberum judicium* to the Church court; and it was objected to by Lord Brougham and Lord Campbell in the House of Lords, and in Scotland by the lately dominant Moderate party, as both changing the law and defrauding the patrons. But the objectors were left in a minority in the very meeting of Commission which was appointed to deal with the Protest; and the new bill remained law till, thirty years after, it yielded to a change more sweeping still. Only a year later Sir James Graham introduced a bill to help the Church on the side where it had been hindered, not by statute, but by the want of legislative power. An Act of Parliament[3] to make parishes "legally and properly" was indeed called for in the same resolution

[1] Dr Robertson of Ellon, who had moved the above-quoted resolution for a committee on the law of 1843, while still opposed to the Church's legislative claims, had by this time come to occupy very nearly the exact position as to its *jurisdiction* of the Claim and Protest of 1842,—the chief document which his committee would have to meet.

[2] 6 & 7 Vic., c. 61, For removing Doubts respecting Admission of Ministers.

[3] 7 & 8 Vic., c. 44.

of Assembly which had rescinded the *quoad sacra* Acts; and the new statute was one not only "to facilitate the disjoining or dividing of extensive or populous parishes" and erecting parishes *quoad omnia*, but also for the erection of parishes *quoad sacra*. Certain stipends and endowments were in this case required as a preliminary; but on the process being thereafter carried through the Court of Teinds (which is a civil, not an ecclesiastical, tribunal), it was declared lawful for the minister to be a parish minister of the Church. The relaxations were urgently needed, and have been vigorously used; for between 400 and 500 new parishes have been added to the Church since the date of the enactment. The contributions of her people under this head, with great endowments added like that of Mr Baird and others, have given the Church of Scotland the rights and claims of a Voluntary Church in addition to its establishment. Its relation to them is not really different from that of the Pre-Reformation Church to what were in the proper sense its endowments—possessions, that is, which had been the private property of the donors, and so were gifted to it; as distinguished from the tithes, which could never be gifted to it because they were already legally due.

A greater legislative change than either of these passed over Scotland in 1845, when the new Poor Law was established. It is generally said that this revolution, long impending, was made necessary in 1843. For then the Church, divided and depleted, found it hopeless to continue longer the support of the poor of the land. But there were other respects in which the change now made on the law was significantly retrospective. That law had been instituted when every man in Scotland was bound under penalties to attend in his parish church, and all ordinary collections made in it were the property of the parish poor. The new Poor Law provides (sec. 54) that these moneys should continue to be applied to the same purposes; but it is too much to expect that this is everywhere literally done, and

indeed a good deal more than half a million appears in the public accounts as "expended on other purposes." But the principle of the law was expressed by Lord Gillies in giving a leading opinion in 1839, when he said, "I hold it a sacred principle in the civil polity of Scotland that the collections at the door of our churches are in truth the property of the poor." A hundred years before (Mor. Dic. 8011) the Court, not without difficulty, found that dissenting congregations were not bound to hand over *their* collections to be mingled with the rest. In truth, the principle on which they were exempted was not clear, and for many years after they were rather ignored by the law as illegal assemblies. Now on 30th May 1839, the case of Panmure, one of those by which the Court repressed the attempt of the Assembly to make its *quoad sacra* churches self-supporting, founded on the same early policy of Scotland. "By the building of a new church," Lord Gillies's opinion went on, "and the allocation of a district to it as a *quoad sacra* parish, the result must be the diminution of the collections at the door of the proper parish church. The erection of the new church, therefore, unless some remedy were provided, would just be an abstraction of a portion of the property of the poor." The difficulty may be, and has been, partly met in the case of churches within the establishment; but the judicial reason applies in the fullest sense to the toleration of churches and congregations outside it. Once the old system, which "thirled" every citizen to the worship of his parish church, and placed him, even against his will, under its jurisdiction and control, was broken up,—broken up, at least, on a large scale, as had now been the case,—the Church had to resign to the nation the charge of the poor (as it was later on to resign also the charge of the young), both held at least since the days of Knox. It retained, however, its interest in the teinds or tithes, which Knox seems to have held to be also properly the patrimony of the poor;[1] though he would have applied them indiscriminately

[1] For a sequence of his views on this point, and its relation to the legislation of the time, see 'John Knox' (Famous Scots Series), p. 106.

to support of the poor, to sustentation of the ministry, and to maintenance of the schools.

We have considered the alleged legislative power of the Church, and the legislation on its behalf by the State, which had denied it such power. But we come now to a group of cases dealing with the *judicial* function which the Church has always claimed, and in Scotland has always exercised. That its jurisdiction within the assigned limits was exclusive and final was never intended to be questioned in 1843; but the principle sometimes seemed to need rehabilitation, and that was now given. The Court has not receded from its position, that the limits and conditions of this Church authority are derived from the State, and that these are to be construed by the civil courts, which have also both right and power to enforce their own construction upon the Church. But within the limits thus fixed, the jurisdiction in matters spiritual, "granted" no doubt by the State, has been granted to the ecclesiastical body absolutely and exclusively.

In the case of Sturrock *v.* Greig[1] it was held that "no action for damages will lie against a Church court of the Established Church for any sentence or judgment pronounced by them in a proper case of discipline duly brought before them, regularly conducted, and within their competency and province as a Church court, even although it be averred that the judgment was pronounced maliciously and without probable cause." This extremely strong position was objected to by Lord Cockburn in one of his pithiest speeches,[2] but the rest of the Court on this occasion was

[1] 11 D. 1220. 1849.

[2] "There are cases in which a consequence is the best of all arguments. If the plea of the defenders be sound, kirk-sessions have an absolute licence of defamation. They have nothing to do but to keep within their jurisdiction; and then, let them abuse it as they may, they are liable to no civil responsibility. They may, with conscious falsehood, ascribe specific crimes to every parishioner who has the misfortune to incur their dislike; or they may select a single individual, and deliberately doom him to destruction by libel; by the assertion of facts

unanimous. The decision is more than satisfactory to churchmen. Even the Free Church, on the principles of co-ordinate jurisdiction which it found in the Second Book of Discipline, did not necessarily demand more than that malice be alleged along with injury, in order to justify either review of an ecclesiastical sentence by the civil, or of a civil sentence by the ecclesiastical, court; it being held that where the act of the judge is proved to have been done from private ill-will, and (in the words of Sturrock's summons) "*under the cloak* of official duty," the act is no longer a privileged one—is, in truth, no longer an official act.[1] Accordingly the doctrine of this case must be regarded as modified by the opinion delivered in a case which occurred soon after, of Edwards *v.* Begbie,[2] in the other Division of the Court. This was the case of a non-established (Episcopal) Church, but the plea that the members of the Dissenting Church court were not liable even when malice was alleged was expressly founded on the case of Sturrock.[3] And the opinion delivered by the Court, after very careful discussion, includes the general principle; and applies, and was intended to apply, to the courts of the Establishment. The argument was long and keen; but the opinion of Lord Mackenzie (with whom the

fatal to his character and peace, which they know to be groundless; and they may persevere in this scheme of moral murder in spite of every explanation, and in defiance of all decency. True, they must preserve the shelter of their jurisdiction, both as to matter and as to form; but this it is always in their power to do."—11 D. 1238.

[1] This was the form in which it was expressed to the author on the occasion of the Cardross case by Principal William Cunningham, the weightiest defender in modern times of Church prerogative in Scotland.

[2] 12 D. 1138, 28th June 1850.

[3] All the judges indicated in Sturrock's case that the same privilege, even against allegations of malice, which they ascribed to the Establishment, would probably be enjoyed by the voluntary tribunals of non-established Churches. Probably neither the one nor the other is absolutely so privileged. Lord Colonsay, when President, indicated in the Cardross case that malice must be alleged against Dissenting Church judges to found an action; and his successor as head of the Scottish Court, Lord President Inglis (in Gibb *v.* Barron, 21 D. 1099), seemed to hold the same—doubting, however, whether it is necessary here, as in the case of the Established Church, to add "want of probable cause."

Lord President M'Neill, afterwards Baron Colonsay, and Lord Fullerton, concurred) was short and explicit: "Supposing the defenders could be regarded as having acted judicially, I conceive the general rule to be, that judges, civil or ecclesiastical, if they, in the exercise of their function, commit a wrong maliciously and without probable cause, must be liable in damages."

The judgment in Sturrock's case, even if we hold it to be erroneous on the point as to malice, is important and instructive on the general question of the administrative jurisdiction of the Established Church. The Lord Justice-Clerk quotes the well-known declaration of the Confession, as to a government instituted by Christ in His Church, distinct from the civil magistrate; and without formally contradicting the strong statements made by the heads of the Court in the previous controversy, he holds it undeniable that in regard to *discipline* ("whether as to doctrine or evil practices") this divine institution is the source of a peculiar and separate jurisdiction. Lord Medwyn found it easier to take the same position, in accordance with the principles which he had consistently maintained and learnedly illustrated. Lord Moncreiff agreed in the practical result, quoting the thirtieth chapter of the Confession of Faith, "Of Church censures," and holding that Sturrock, as a member of the Church, had "voluntarily submitted himself to the jurisdiction legally constituted for dealing with such things." Lord Cockburn protested in vain, that the decision amounted to a "direct reversal of the principle of the memorable decisions" pronounced ten years before; and the Court refused to send to a jury the judgment of the kirk-session alleged to have been pronounced "falsely, calumniously, maliciously, and without probable cause."

This is so very strong that we become chiefly interested in what the cases are which the Bench was willing to admit as exceptions. The Lord Justice-Clerk observed, "that the Church courts must act within the limits assigned to

them;" that the matters dealt with must be "clearly within the cognisance of Church officers or courts;" that a member of an Established Church has this protection, "that the grounds on which discipline can be exercised over him may be defined by, or must be consistent with, law;" and that, for example, the Church courts "may be limited in their powers as to what shall be the doctrines of the Church." His lordship's most important generalisation was, that "these views will not surround these courts with protection *if they exceed their jurisdiction*," giving instances of this excess which have a manifest bearing on the cases before the Disruption of 1843; but he went very much farther when he added, in accordance with the same cases, that these would be no protection "if Church courts" (negatively) "*refuse to perform* a duty imposed on them by statute, as a part of the ecclesiastical constitution of the Church." And in accordance with this, he declared that he could easily conceive many questions "which might arise regarding the conduct of a Church court, even when in the exercise of its proper province of discipline" (such conduct, for example, as subornation of testimony, an allegation which he held would be diverse from that before the Court, which was a mere general imputation of malice). Lord Medwyn remarks that the boundary between the civil and ecclesiastical is hard to hit, but that "within the proper province of the Church court" its proceedings cannot be questioned by the civil authorities. He adds, however, the awkward exception, that if, for example, a minister were kept out of his benefice "from some unworthy and improper motive, and in a case of manifest violation of duty," damages could be obtained through the civil court. And he made the difference between such a case (which was the second Auchterarder case, the improper motive being the alleged conscientious objection to intrude a minister upon a recusant congregation, and the violation of duty being the contravention thereby of the ruling of the civil courts),

and the present, that the present was not for patrimonial loss but for solatium—a distinction which Lord Moncreiff ignored, and Lord Cockburn scouted, in their opinions which followed.

That this case, even with these exceptions, gives a large measure of protection to Church judicatories is certain. The general rule, that an action of damages will only lie against the members of a Church court if they are proved to have acted maliciously and without probable cause, was affirmed in the same year in the case of Dunbar *v.* the Presbytery of Auchterarder.[1] Here the Court reduced the sentence of a presbytery deposing a schoolmaster (under the Schoolmasters Act), but refused the man injured an action against the members of court unless he made these allegations. Up to this point there is no doubt of the protection accorded to Church courts, even when they act as a board under special statute. But the attempt of the Lord Justice-Clerk to carry this farther in the case of Sturrock, so as to give these courts in matters of discipline not only a real but a peculiar and aboriginal jurisdiction, and so to refuse action against their members when both malice and want of probable cause are alleged, cannot be said as yet to be successful. The practical result of it has, as we have seen, been authoritatively questioned in the case of Edwards *v.* Begbie; and the theory on which it was founded was, with much plausibility, stated by Lord Cockburn to be equivalent to "a direct reversal of the principle" of the judgments of 1843. "I am aware that this is not what your lordships mean; but I suspect that it is the only construction that lawyers can put upon what you are doing." Perhaps the only thing to be certainly concluded from this case of Sturrock is, that the bare *allegation* of malice, without a sufficient detail of facts to support it, will not be listened to against ecclesiastical judges. A mere imputation

[1] The opinions of the First Division upon the occasion are instructive: 12 D. 284, 11th Dec. 1849. See also Smith *v.* Presbytery of Auchterarder, 12 D. 296.

of evil motive will not found a claim of reparation. In the mean time we may pass from it to the other cases.

Two years after, in Lockhart *v.* the Presbytery of Deer,[1] "a minister, who had been deposed by the General Assembly on the ground of immoral conduct, presented a note of suspension against the sentence being carried into effect, on the grounds that the libel on which the sentence proceeded was defective in the instance, that evidence had been improperly rejected, and that the procedure before the presbytery had been generally irregular and oppressive." The former case had been before the Second Division; and this came before the First on a reclaiming note from the decision of Lord Colonsay, afterwards the Lord President, who held that it did not appear that the presbytery, in dealing with a case confessedly appropriate for its decision, had "exceeded their powers, or acted in violation of any statute." The Court did not even call upon counsel for the presbytery, but unanimously refused to inquire into its proceedings. The difficulty of the Auchterarder and Strathbogie, and other precedents, was referred to by Lord Fullerton, who thought them "special cases;" and by Lord President Boyle, who defended them on the ground that the decisions of the General Assembly, which had been there reviewed, "involved a departure not only from the statutes of the realm, but from the constitution of the Church itself." In 1861, in the case of Paterson *v.* The Presbytery of Dunbar,[2] a similar suspension was asked on the ground of a plea of insanity not having been duly attended to in the Church court. The Court refused it without difficulty, on the ground that every court having jurisdiction has a right and duty to regulate matters of procedure, so as to explicate that jurisdiction. And, lastly, in the (Auchtergaven) case, Wight *v.* The Presbytery of Dunbar and General Assembly,[3] the same sort of question was raised in a case which had got as far as the Assembly, and was remitted by it to the presbytery. In this case the Lord Justice-Clerk

[1] 13 D. 1296. [2] 23 D. 720, March 9, 1861.
[3] 8 M. 921, June 29, 1870.

Moncreiff thought that there might be a strong call for interference, if it was a case which the civil court was at all entitled to review. But, of course, he held that there was no review, and that purely on the old ground of separate jurisdiction and finality of judgment. "Within their spiritual province," he went on to say (perhaps rather ambiguously), "the Church courts are as supreme as we are within the civil." So in the previous case of Paterson, Lord Ivory had put it even of a presbytery that it is "a supreme court within its own sphere." But neither judge intended to suggest a doubt as to the ruling of 1843 that it falls to the civil court to decide what the "sphere" or the "province" is; and that in the event of that ruling conflicting with the decision even of the highest Church courts, the latter are bound to yield, and to carry out the view of the Supreme (civil) Court not only passively but actively, and even in their own province and sphere. Lord Moncreiff indeed (the descendant of a line of men illustrious for their services to the Scottish Church)[1] went farther occasionally than any other judge, except the Lord Justice-Clerk Hope in Sturrock, in suggesting that in our law the measure, if not the source, of Church jurisdiction is the subject-matter, which is in its own nature spiritual, or sacred. But half the Bench, even in Sturrock, and the whole Court in all the other cases now reviewed, fell back for the source (and of course the measure) of that jurisdiction on statute. And, so far as judicial Church work is concerned, Scottish statute and Scottish law have been at all times lavish and ungrudging in the ascription of jurisdiction, and of all that may be necessary to work it out, to the Church courts. Finality would have been allowed them equally at any time before, or after, *or even during*, the ten years' crisis of 1843—as the judges in that conflict constantly declared. Yet a doubt had been thrown upon this in the popular mind (as the succession

[1] The general views of *James* Moncreiff, long Lord Advocate, and by this time Lord Moncreiff of Tullibole, on Scottish Church matters are eloquently given in one of "Three Lectures on Church and State," 1877.

of cases brought into court about this time showed), and if any rehabilitation were needed, it was well that it should be emphatically given.

But the idea that any of these cases reversed the law of 1843, and in particular its law as to jurisdiction and its source, is not one which lawyers can seriously entertain. Assuming (what is emphatically not the case) that Lord Justice-Clerk Hope [1] and Lord Medwyn intended this, it is enough to say that their authority would not be sufficient to set against a solid mass of constitutional decision, weighted by the immediate sanction of the Legislature and the Crown, a sanction given upon the solemn appeal of the Church of Scotland in a crisis of its history.

And even this group of cases, while it reaffirms the judicial powers of the Church, provides for interference in certain exceptional circumstances. It is so difficult to formulate what these exceptional circumstances must be, that the idea recurs frequently that the question is one of *degree*. The courts have refused to allow an action against ecclesiastical judges on the ground of malice,[2] and have refused to review an ecclesiastical sentence on the ground of irregularity.[3] Yet there can be little doubt that *such* a case (of malice on the one hand, or of irregularity on the other) could be stated as the Court would at once take up. If the irregularity came to be *ultra vires*, or to be contrary to statute, or, without being so, amounted to a gross withholding of justice by the ultimate Church tribunal, the act would probably be held to amount to legal malice, and at all events to come up to the exceptional cases admitted by the Lord Justice-Clerk Hope. And if the allegation of malice, on the other hand, were not only, as

[1] The Lord Justice-Clerk Hope had, when Dean of Faculty, not only been the leading counsel against the Church, but throughout urged the Government to stronger measures. The recently published correspondence of Sir Robert Peel shows that the Prime Minister had come to distrust Mr Hope's advice even before the Disruption of the Church.

[2] Case of Sturrock.

[3] Cases of Lockhart and of Dr Lang, *infra*.

in the case of Sturrock, a mere imputation of motive, but a detail of ecclesiastical corruption or conspiracy against which there was no ecclesiastical remedy, the result would probably be the same. In both the cases which we have been considering, it was carefully laid down by the Bench that they did not mean to make a precedent for "extreme cases:" and it may be inferred that the Scottish Supreme Court will not exclude itself by anticipation from the consideration of such cases when they arise.

One point, at least, in addition these decisions would seem to show—viz., that so long as there is any ecclesiastical remedy competent for an ecclesiastical irregularity, the Court will not step in to put it right. They will not reverse the ecclesiastical act until the superior court has been appealed to. This was formally found in the case of Dr Lang *v.* The Presbytery of Irvine (5th March 1864, Macpherson's Reports, ii. 823), where an action of reduction of the findings of a presbytery on the ground of irregularity and illegality was held not competent, because the pursuer had not exhausted the remedies open to him in the ecclesiastical judicatories. This of course does not apply to actions of reparation or damages for the irrevocable consequences of a wrongful act already done; and this very case of Dr Lang's indicates that the courts may in some cases leave it to the Assembly to rectify the ecclesiastical wrong, while (if malice is proved) they may themselves give civil reparation for the civil injury which that wrong has caused. But it cannot be said that the courts have receded from their ultimate right to review and reverse the ecclesiastical sentence itself, by way of reduction, provided there be a final failure of justice.

It may be safe, therefore, to say that, in the judicial proceedings of the courts of the Established Church, it is only when they act in some way which is *ultra vires*, or outrageously unjust,[1] or contrary to express law, that they

[1] In Dunbar *v.* Stoddart (11 D. 587) the phrase "violation of duty" was held to be pretty nearly equivalent to malice. See also the Auchterarder cases.

can be repressed by the supreme civil courts. These civil courts, on the other hand, have the exclusive right of determining whether the former have or have not so acted. And (notwithstanding the Bill "to declare the Church's jurisdiction" approved by the Assembly of 1898) their right of correcting and coercing the Church courts extends to the *spiritualia* as well as the *temporalia* with which the Church has dealt. And lastly, this interference may be claimed and set in motion by any one who can show any civil right or any civil interest affected directly or indirectly by ecclesiastical proceedings of the extraordinary nature supposed. For it is only in extraordinary cases that the question can arise—in cases where the wrongful act has been so wrongful as to lose the aspect of being judicial, and the protection which that aspect affords.

The Church of Scotland was occupied about this time—the middle of the century—with various important and legitimate interests,—among others, with the Endowment Scheme, for which Parliament had supplied a framework, and with proposed changes and innovations on its forms of worship. But before the close of the sixth decade a more energetic and more public course of action was taken. The dissatisfaction always felt with the system of Patronage, even as modified by Lord Aberdeen's Act, had now become influential, and the Assembly of 1869 resolved to approach Parliament for its abolition. The step may have been accelerated by the negotiations for union in which the Presbyterian Churches outside had for six years been engaged, and which were to result in two immediate unions, and at a later date in a greater still. The Moderator indeed (Dr Norman Macleod), in a deputation on 18th June of this year to Mr Gladstone as Prime Minister, declared the special object of the Anti-Patronage movement to have been "the conciliation of the Free Church." But it was decided to make

no overture to that body, and yet during the interval before the bill was introduced in 1874, a continuous argument was addressed to the country to the effect that such a measure must satisfy the Church and State claims of the Free Church, if not indeed of all the Anti-Patronage Presbyterians outside. In the House of Commons this mistake was not repeated: the measure was claimed as a direct and undoubted benefit to the Church, and it was left to Mr Gladstone[1] (now in Opposition, and indeed in retirement) to revive the historical question. But one Scotsman, the chief lay representative of the Church, and eminent alike in rank, talent, and patriotism, the late Duke of Argyll, urged that the law of 1843 must fall along with the existence of Patronage, so eloquently and persistently, that only one thing prevented his view from influencing the country. He had himself been as a young Whig nobleman an *upholder* of Patronage as well as of Disruption in 1843, and it was partly owing to his wish, along with that of Dr Chalmers (a Conservative in politics), that the Church's Claim and Protest were then devoted so exclusively to the real ground of separation that they not only made no complaint of Patronage, but avoided mentioning the subject.[2] This vacillation had important effects. It did not in the least prevent the Act of 1874 from having its

[1] See Hansard, 6th July 1874.

[2] Dr Chalmers' Memoirs, iv. 283.

The most authoritative answer to the Duke was the Rev. Sir H. W. Moncreiff's 'Identity of the Free Church Claim from 1838 to 1875;' but a somewhat different view of the law is presented in the pamphlets mentioned below along with those of his Grace. The whole sequence is as follows:—

Letter to the Peers, from a Peer's Son. Edinburgh, 1842.

Letter to the Rev. T. Chalmers, D.D., Edinburgh, 1842. (By Lord Lorne.)

The Church of Scotland Crisis, 1843 and 1874, and the Duke of Argyll. By A. Taylor Innes. Third edition, with Correspondence. Edinburgh, 1874.

The Patronage Act of 1874 All that was Asked in 1843; being a reply to Mr Taylor Innes. By the Duke of Argyll. Third edition. Edinburgh, 1874.

The Scotch Law of Establishment; an Answer to the Two New Positions of the Duke of Argyll. By A. Taylor Innes. Edinburgh, 1875.

proper and large influence within the Church, as a popular measure giving the franchise at once to a new and rather indiscriminate constituency. But it prevented so great an event historically as the abolition of Patronage from having its due influence with the Presbyterians who had for two hundred years opposed it, and it forced them to fall back now on their real ground of quarrel with the State, and their real plans for the future. Even before the Act was passed the Free Church Assembly had resolved that the one solution for the future of Scottish Presbyterianism was disestablishment. But the resolution was proposed by their great Church lawyer, Sir Henry Moncreiff, the son of the Lord Moncreiff who had moved the Veto Act in 1834, and brother of another Lord Moncreiff, Queen's Advocate for Scotland during eighteen years. And by those more conservative churchmen the plain political word, Disestablishment, was at first veiled under the phrase, "the termination of the present connection of Church and State in Scotland." It was not till Lord Hartington, the newly chosen chief of the Liberal party after Mr Gladstone's retirement, came down to address Scotland in 1877 that it was authoritatively told to the country that the procuring of the recent legislation had been "a step in the direction of Disestablishment." And thenceforward the general representation among Liberal politicians was that the Church herself was responsible for gratuitously raising the Disestablishment question in 1874. It may have been so. But it is exceedingly difficult to see what overtures the Church within could on this occasion have wisely made to that outside, unless it were prepared (as both courts and Church were in 1843) to put Establishment also into the issue. And it is certain that whatever may have been the case with politicians, the churchmen, who were now planning for union and freedom outside, founded their renewed farewell to establishment on far other and stronger grounds, historical and theoretical, than the belated legislation of 1874.

That legislation, and the important law laid down with regard to it, we must now notice. At the Revolution of 1690 it was provided by statute that a new minister, proposed by the heritors and elders, should be approven or disapproven by the "whole congregation." But in falling back upon its "fundamental law" in 1834 the Church gave the veto to the whole heads of families in "full communion." And even during the thirty years after Lord Aberdeen's Act had conceded a right of objecting to "members of the congregation," the Church after 1843, in accordance with the same Presbyterian principle, ruled this to mean "communicants in the congregation." So when it at last voted in 1869 in favour of "the abolition of the existing law of Patronage," the Assembly resolved that the nomination ought to go generally to heritors, elders, "and communicants," and on the following day approved of an Interim Act by which, "in conformity with the law of the Church, the words 'members of the congregation' shall mean persons in communion with the Church." There were those in this Assembly (in which the Moderate defenders of Patronage were by this time in a great minority) who seemed to have the idea that the Church could itself legislate on this matter, under the usual Barrier Act precautions. But the House wisely resolved, as "the provisions of the Barrier Act are not applicable to resolutions as to Patronage," to petition Parliament for "an alteration in the law regulating the nomination of ministers." The altered law came not till 1874, and in the hands of Lord Advocate Gordon and the Duke of Argyll it became an Act declaring the right of electing and appointing ministers to be vested "in the congregations" of vacant churches. But this was subject to regulations as to the "mode" of electing to be framed by the Church itself; and the Assembly of 1874 at once not only approved generally of the bill (then in the House of Lords), but laid down a new plan by which declared "adherents" of a congregation should have each an equal vote

with the "communicants." In the Assembly as well as in Parliament some were found to recall the time when every parishioner was entitled (and bound under penalties) to be a member of the one tolerated congregation; and proposals to extend the franchise to all ratepayers, or all parishioners being Protestants, were made, but found very few supporters. Within the Church the sweeping extension of franchise was clearly popular. And its leaders were on the whole satisfied on the great matter of jurisdiction, with the provision that

> The courts of the Church are hereby declared to have the right to decide finally and conclusively upon the appointment, admission, and settlement in any church and parish of any person as minister thereof.

The application to the 1874 enactment of the general Church and State law of 1843, and, in particular, of that law as to jurisdiction, came in the case of Stewart *v.* The Presbytery of Paisley.[1] The question arose here whether it was the congregation, under sec. 3, or the presbytery, under sec. 7 (*jure devoluto*, after the lapse of a certain length of time), who should choose the minister. It was pleaded that the jurisdiction to decide this matter obviously belonged under the above-quoted clause to the Church courts, not to the Court of Session. Of course, even apart from such a clause, on the principles of the Church before 1843, election of its pastor by a congregation, and his election by a presbytery, and the necessary decision between these alternatives, are all in their own nature purely Church questions. The judgment of the Court was delivered by Lord President Inglis, the greatest authority in our law during those sixty years.[2] And before

[1] 15th Nov. 1878. 6 R. 178.

[2] This First Division judgment may be said to have also the full authority of the Second Division; for in the same year, in Cassie *v.* General Assembly (6 R. 235), Lord Moncreiff, who spoke for the majority of the Court, said, "I entirely adopt the opinion of the Lord President in Stewart *v.* The Presbytery of Paisley;" and Lord Gifford, who dissented, did so because he thought they ought to go *farther* in the direction of the Lord President's opinion.

laying down "the nature and limits of the exclusive jurisdiction" given by this statute, he pointed out that the congregational right is "essentially different in character from the former right of patronage," so that it is inaccurate to describe it as a transfer from former to later holders. The former right of patronage was ancient and well known. But that now given to the congregation "is a statutory right, limited" by, among other things, the right of the presbytery. The congregation, indeed, has no corporate "or quasi-corporate or collective right or function, except that conferred by the State," and must by no means be taken as equivalent to the parishioners, whose existence and rights are well understood by the law. But not only is the congregational right definite and limited, but that of the presbytery too. "The presbytery, whether under this statute or any of the previous statutes respecting Patronage, are not acting in any judicial or even quasi-judicial capacity, but only as statutory trustees authorised *and required*, on consideration of public expediency, to exercise the right of appointment *pro hac vice*."

These being the legal rights of the inferior Church bodies, they at least had no jurisdiction in the matter. But what as to the Church itself, or its General Assembly? The rights in question,

Being legal rights depending on statute, their enforcement or a challenge of their validity in any particular case can only be tried in the tribunal which is appointed to interpret and enforce the statutes of the realm; that is, the supreme civil courts, unless the jurisdiction and duty had been conferred and imposed on some other tribunal.

The State might have given the jurisdiction to decide between presbytery and congregation to any other civil tribunal, *even an inferior one;* or

The Legislature, being omnipotent, might in like manner have conferred this jurisdiction on the courts of the Church; though an enactment conferring on these courts power to adjudicate in a com-

petition of statutory rights would be so entire a novelty, that it would have required very clear words in such a case to oust the ordinary tribunals.

And the clause here granting the right "to decide finally upon the appointment" is not enough: it must be construed as the right to decide questions as to a particular appointment made by one of these electing bodies—not a question arising between two, each having statutory rights.

Of course, even if the Court had adopted the opposite construction of this clause, the general law of 1843 as to Church and State, and especially as to jurisdiction,—ascertained first in the Auchterarder case, and recapitulated in 1878 in these two paragraphs of the Lord President,—would remain untouched. The particular jurisdiction in the election of ministers, granted by this statute, would then have been wider than it is; while even as it is, it is wider than was conceded in the case of Auchterarder. In either event, the exception would prove the rule. But the express grounds of this decision throw us back directly and emphatically upon the findings of 1843. We have again the main blocks of that solid mass of constitutional law—its preference, when the State confers Church functions or imposes Church duties (upon either congregations or presbyteries), to construe these as ministerial or administrative rather than judicial; its far more emphatic doctrine that, whether judicial or administrative, these duties must be carried out not merely to civil and pecuniary effects, but in the Church sphere and by positive Church action, and that irrespective of what may be the judgment as to their duty in the matter of either the Church courts or the Church itself; its authoritative sentence that where the State has not granted jurisdiction (even in things which for the matter of them are purely and properly ecclesiastical) such jurisdiction remains in the hands of the State, and is to be exercised through its supreme civil courts, unless it be otherwise delegated—which delegation (it is now for the first time announced) the State may make even to one of

its inferior civil tribunals, a sheriff court or J.P. court. And lastly, there is the fundamental omnipotence of the Legislature, which may be exercised in not merely varying or transferring, but also creating or abolishing, such Church functions, and in particular that old test function of jurisdiction.

Naturally, the general question of Establishment in Scotland was now everywhere discussed. In 1877 Lord Hartington had pledged the Liberal party in England to deal with that matter on its own merits, and apart from English questions, as soon as "Scotch opinion, or even Scotch Liberal opinion," should be fully formed upon it.[1] Three separate motions for parliamentary inquiry into Scottish Church matters by three Scottish members were rejected by the House of Commons on 18th June 1878;[2] and in 1879 Mr Gladstone (who had by this time lost his personal interest in the question) was content to table it for "fair, full, and open trial."[3] The years following, especially perhaps 1882 and 1883, were full of educative discussion on all Scottish platforms, secular and ecclesiastical,—the churchmen, as has often before happened, carrying the palm even in popular meetings for reasoned and persuasive eloquence. But the political parties were also taking shape, and in October 1885 the official Liberal Association resolved, by a vote of more than fifty to one, that the time had come for Disestablishment being a plank in their platform. Six months later the proposal of Home Rule for Ireland somewhat divided the party, and the question ceased to be as acute in Scotland. Yet Disestablishment Bills, at first by Mr Dick Peddie, afterwards by Sir Charles Cameron, were voted on year after year. And the last decade of the Victorian century heard Disestablishment twice over proposed in the

[1] At Edinburgh, 6th November 1877.

[2] The 'Times' of that morning contained a letter giving reasons why all three motions seemed to the present writer to be inadequate.

[3] Letter to Principal Rainy, in 'Times,' 24th June 1879.

Queen's Speech as the solution of the whole Church entanglement in Scotland — once, in 1893, by way of a Suspensory Bill "for the prevention of the growth of new vested interests in the Ecclesiastical Establishment of Scotland," under Mr Gladstone; and again, in 1894, in a more formal bill, under Lord Rosebery, who, as leader of his party, took occasion to refer to this as a public pledge of their adherence to "a prominent part of our programme."

The Church of Scotland regarded all these proceedings against Establishment as hostile, and met them with steadfast opposition. Yet within it, the old Scottish principle of spiritual independence, which recovered ground so rapidly after 1843, prevailed now more and more, and that not merely among the laity. On the 29th of May 1874 the General Assembly, on the same day on which it approved of the Anti-Patronage Bill, had unanimously resolved to instruct its committee

> That they take care that no enactments be sanctioned which appear, directly or indirectly, to throw doubt upon the supreme authority of the Church, in regard not only to the trial and admission of ministers, but also to all matters of doctrine, discipline, and government in the Church, as the said liberties, privileges, authority, and jurisdictions are ratified and secured by the Act for Securing the Protestant Religion and Presbyterian Church Government and Acts therein confirmed, and by the Act ratifying the Treaty of Union.

"Supreme authority" in doctrine, discipline, and *government* might well seem to be the autonomy denied by the courts in 1843, and would certainly not have been claimed against the Legislature by the Assembly of that year. Yet the form of this resolution, as explained by the Procurator of the Church, who moved it, was intended to discourage any attempt to change (by a clause in the Patronage Act, or otherwise in connection with it) the general law of 1843. It must not be conceded, it was argued, "that they required any enactment from the Legislature" to remedy, or even to clear up, the present state of matters. This, however, was

felt to be too strong a view as to decisions which had so divided the Bench, and against which the Church of Scotland itself, before a disruption, had gone to Parliament. Accordingly, immediately after, it was proposed that to the clause in the bill giving the Church courts power to decide finally on the appointment of ministers [1] should be added, "in like manner as upon *all other* questions which it is the province of the Church to deal." Considerable discussion ensued, but ultimately the proposed clause (by no means an adequate one) was withdrawn; and the final-jurisdiction provision of the bill was retained as already quoted. And it was this unanimously approved provision which elicited from the head of the Scottish court his ruling as to "supreme authority" [2]—upon a construction which seems undoubtedly harsh, were it not for the extreme view on such matters which in 1843 was declared to be fundamental, and so to dominate all administrative and constructive ambiguities.

The great opportunity of the century for reconstruction in Scotland [3] had thus passed unimproved. But the demand for reconstruction persisted on all hands, and during the whole period of public conflict we have reviewed, innumerable conferences, private and semi-private, were held on the subject. Most of them found it impossible to avoid the ultimate question as put by both the Church and the civil courts in 1843, and earlier still by the Scottish Voluntary Churches. But a "Laymen's League," including names like the (late) Duke of Argyll and Lord Moncreiff, pressed for reunion in the future on easier terms—with Establishment of some kind as its bond. And in 1878 the Church of Scotland itself, influenced thus from within and without, invited a conference with the two chief bodies outside. But

[1] P. 116. [2] P. 117.

[3] No more curious relic of the time is to be found than Robert Louis Stevenson's 'Appeal to the Clergy of the Church of Scotland, with a Note for the Laity,' 12th February 1875. (Collected Works, last volume.) It stands out like an erratic block on the picturesque plain of his writing.

the proposal was very guarded. It expressed a desire to take all possible steps for union and reunion "consistent with the maintenance and support of an establishment of religion," and with their desire to maintain inviolate not only national religion but "the sacredness of endowments." But with this preamble it invited "frank and friendly conference as to the causes which at present prevent the other Churches from sharing the trust now reposed in this Church alone."

The United Presbyterian Church had no difficulty in answering this proposal in a dignified and hopeful way. But the reply of the Free Church,[1] written by Sir Henry Wellwood Moncreiff, Bart., expressed so exactly their half-way position between the Disruption in 1843 and the Union in 1900, that it is well to put it on record. In the first place, they frankly invite the Church of Scotland to consider the unanswered Claim of Right and Protest, as documents in which not the Churches only but the State are interested. And they

> Represent to the brethren of the Established Church, most respectfully and earnestly, their conviction that in that Claim and that Protest the principles are set forth on which alone the divided sections of Presbyterianism can ever be reunited; and their hope that on these principles they will, by God's blessing, in due time actually be reunited. Nor do they feel that in taking this ground they are acting otherwise than in the most friendly spirit. For, in spite of all misunderstandings, they are convinced that the essential principles of the documents referred to must be dear to members of the Established Church as the glorious inheritance of all Scottish Presbyterians. With respect to the question of conference on "the causes which," in terms of the invitation, "prevent the unendowed Churches from sharing the trust now reposed in the Established Church alone," whatever may be the sense in which the phrase is to be taken, it seems plain that any useful conference must have regard to the far higher

[1] Reported to the Assemblies of 1879. Both Assemblies publish their "Acts" yearly; but the Free Church has had since 1843, and the Church of Scotland has begun recently, an annual record of the Assembly "Proceedings and Debates."

trust committed to the Presbyterian Church of Scotland by her divine Head, and to the duties which fidelity to that trust implies. Our divided condition must, it is thought, be mainly traced to some failure in apprehending the character and consequences of that trust, which for the Church is of primary and perpetual obligation, while the province of the State is, not only not to interfere with the discharge of it, but to acknowledge it as already existing, and to maintain it inviolate.

The General Assembly of 1879 merely recorded its regret that these replies did not encourage the hope of further useful correspondence; but in 1886 it once more renewed the approach and proposal, with very similar reservations. On 28th May of that year its letter was read to the Free Church Assembly, which in reply pointed out that their previous answer had never been acknowledged, and while referring, "as candour requires," to their often-repeated Assembly resolution in favour of Disestablishment and Disendowment, they

Hasten to add that, if the Established Church should see their way to treat the points of difference between their communication and the resolution now cited as open for discussion, the Assembly of the Free Church will readily agree to an invitation to enter into conference with a sister Church on a matter which so intimately concerns the Christian interests of the whole community.

The United Presbyterian Church, too, again made it plain that they also would discuss the whole principles involved or none at all. On both occasions, in 1878 and 1886, the criticism was thrown out that the Church of Scotland had offered a conference which must exclude from discussion the main points of difference; while the others proposed to exclude nothing on which either party laid stress. That was to a certain extent true. But the limitation in the original offer had been deliberately made; and the Assembly, on receiving the renewed response of the other Churches, and in particular the Free Church offer to meet, passed courteously and "with profound regret" from the whole suggestion of doing so.

We now leave the region of inter-ecclesiastical conflict and negotiation, for that of proposals for parliamentary enactments on behalf of the Church of Scotland. Until very recently, when there has been a startling development, these efforts have dragged on ineffectually. In the year 1886 the present Attorney-General, Sir Robert Finlay, who had promised his Scottish constituents a measure on the lines of the Free Church Claim of 1843, produced a bill. It turned out to be a measure declaring in very sweeping terms the "exclusive jurisdiction" of the Church of Scotland in matters spiritual—declaring, that is, the only thing which that Church did not need to have declared, and omitting the whole 1843 matter of a right to self-government or a subjection to statute. A second clause in the bill, however, defining matters spiritual in the wide sense of the Church's own Standards, raised the question whether the two clauses together might not perhaps become a greater protection in the future than the Standards themselves had been in the past. But the better opinion seemed to be that no change in the general law of 1843 was even intended by this measure, while it certainly could effect none; and that in the event of questions analogous to those dealt with in the old decisions again occurring, every one of those decisions would be repeated even under the new enactment.[1] The two views of the measure, however, that it did not change the law of Scotland and that it did, mingled about equally in the very considerable support which it received in the winter of 1885-86; and it became necessary for the Assembly's committee to deal with the matter. That body took a line (approved by the Assembly) which seemed still more conclusive as to the ambiguity of the proposal. They resolved that the Church did not need the measure, even to confirm declaratorily the

[1] This, at least, was the view presented in a pamphlet supposed at the time by some high authorities in our law to have proved its case. Mr Finlay's Bill and the Law of 1843. By A. Taylor Innes. Edin.: Maclaren & Macniven, 1886.

existing law: they approved, however, of its *purposes*, without committing themselves to details; and if others promoted it, they would gladly negotiate with them about reunion. But before the Assembly met on 17th March 1886, the House of Commons, on the motion of the Secretary for Scotland, Sir G. O. Trevelyan, rejected the whole bill by a considerable majority. And from that moment the measure ceased to be actively pressed, though a Government friendly to Church establishments now came into power and later on obtained a great majority. The proposal had already failed to influence the Free Church section to whom it appealed. A year or two after, Sheriff Jameson, an eminent legal representative of the Laymen's League, announced upon its platform that any such bill must contain an express disavowal of the principles of the 1843 decisions; and in 1893 the measure was amended ostensibly in that direction. The leading clause now provided that the Church courts have sole and exclusive right to decide all matters spiritual, free from interdict, reduction, suspension, or any manner of review, "notwithstanding anything contained in the judgments and opinions in the cases in the Court of Session and the House of Lords, decided during the years 1838 to 1843 inclusive." The bill in this form (promoted by Sir James A. Campbell instead of Sir Robert Finlay [1]) received from the Church the same kind of reception—the committee remarking that they did not feel "called upon to object" to the new clause, because among other reasons it expressed neither approval nor disapproval of those who went out in 1843 or of those who stayed in. The new measure, naturally, had even less success than the old.

But these legislative futilities, proposed nominally from the outside, were now to be succeeded by one which, though still declaratory in form, made a real and momentous change

[1] It was "prepared and brought in by Mr Campbell, Sir Mark Stewart, Mr Parker Smith, Mr Hozier, Mr Anstruther, Mr Thorburn, Mr Baird, and Sir John Pender."

in the law; and which besides emanated from within, and from the Supreme Court of the Church itself. In 1898 Dr Mair of Earlston, as chairman of a Committee on Legislation, which had received instructions "to have suitable provisions framed" on this subject, presented to the General Assembly a "Draft Bill to Declare the Jurisdiction of the Church of Scotland." Its two leading clauses were almost the same as those of Sir Robert Finlay. But it omitted the latter's bold proposal to transfer to one of the Presbyterian Churches the parochial powers throughout Scotland of the Court of Teinds; and instead of saying that the Church shall have final jurisdiction in matters spiritual "notwithstanding the decisions of 1843," it proposed the following clause:—

> No court of civil jurisdiction shall suspend, interdict, or otherwise impede any proceedings before any court of the said Church; and if any question shall arise in a court of civil jurisdiction as to whether the jurisdiction of the said Church has been exceeded in any deliverance pronounced by any General Assembly of the said Church, and if such court shall find that the jurisdiction of the Church has been exceeded, it may give judgment as to the extent, if any, to which the complainer shall be protected from the effects of the said deliverance on his patrimonial rights and interests, but shall not in any other way disturb the deliverance of the said General Assembly.

The bill in this form—for it has been adopted in principle by the Assembly—must be regarded as the high-water mark of the Church independence movement within the Establishment. It is far more definite than using a mere "notwithstanding" to slur over the whole "judgments and opinions" of the decisions of sixty years ago. So far, indeed, as one distinct class of cases goes—those in which the civil courts think that the Church courts have exceeded their jurisdiction—it concedes "all that was asked in 1843," —all, at least, that was asked as essential in order to avert immediate Disruption. The line drawn is precisely that by which the Claim of Right of 1842 defined the minimum then necessary to continue to work the Church—the minimum which was refused in succession by the Moderate

minority of the Assembly, by the judges of the Court of Session and the House of Lords, by Sir Robert Peel's Government on behalf of the Crown, and by the English majority of the House of Commons. Yet to such a bill the support of the Church was offered by the Assembly of 1898; and that in spite of the protest of the Secretary for Scotland, Lord Balfour of Burleigh, who, by his work as guardian of the "interests" of the Church during its recent years of danger, even more than by his position in the Cabinet, had earned full right to give any needed warning. It is a great advance, and must be recognised. And yet nothing shows more the extreme difficulty of going to Parliament on this matter of Scottish Church jurisdiction—the hopelessness, indeed, of doing so, apart from the other matter of Church legislative power—than the two days' Assembly debate (of 20th and 25th May 1898) which resulted in the present bill. That bill, unlike the deceptive drafts of previous years, made an unmistakable and important change on the jurisdiction law of 1843 *and of the present day.* Yet the Assembly, while resolving [1] that such a bill, if promoted from outside the Church, "*should be supported by the Church,*" was unable to drop the formula that it was already "satisfied of the independent and exclusive jurisdiction of the Church in spiritual matters,"—a very extraordinary statement for any Presbyterian Church to make, even if it had in view only the last law laid down on Church

[1] The resolution was as follows:—

"The General Assembly are satisfied of the independent and exclusive jurisdiction of the Church in spiritual matters, but having regard to the repeated representations which have been made that a Declaratory Act on this subject is greatly desired, and would remove conscientious difficulties of many, and also to the frequent expression of former Assemblies of sympathy with those who have such difficulties, and the frequent declaration of a desire that such difficulties should be removed, they resolve that in the event of its appearing that a considerable body of opinion outside the Church is in favour of the promotion of a bill in terms of the draft bill appended to the report, the Church should undertake its promotion, and that, in any case, if such a bill were promoted by others, it should be supported by the Church."

The Assembly also appointed a committee to "receive communications" on the subject.

jurisdiction—viz., by Lord President Inglis in 1878. And the leading supporter of the first proposal distinctly to reverse the law of the Court of Session and the House of Lords, Dr Archibald Scott of Edinburgh, founded his preference for the new measure on the view that

> The bill now known as Sir Robert Finlay's[1] casts reflections upon the judges of the Court of Session and the House of Lords. He would accept no bill which cast reflections on their predecessors who so nobly fought the battle. . . . Sir Robert Finlay's bill was a most objectionable bill in his opinion just because of that.

Accordingly, even Dr Mair's bill, which, though it casts no reflections on the lawyers or churchmen of 1843, would reverse their law in favour of that of the Free Church Claim of Right, should not be actively promoted by the Church, unless a "considerable body of opinion" in the same direction appeared outside. And the motion, recommended to a majority of the House in this refrigerating way, was strongly opposed by a large minority. Principal Story, on the first day of debate, indicated a preference for the measure of Sir Robert Finlay, apparently on the ground that after all it made no change on the law.[2] But in any case he was against going to Parliament on such matters. "What Cæsar gave, Cæsar could take away." And on the closing day Lord Balfour of Burleigh tabled a motion against committing the Church to the terms of the bill. He might have to give his opinion in the Government upon it. There were phrases in it which Parliament would be very chary indeed of accepting. He himself viewed it "with doubt, almost with alarm." The Assembly, however,—influenced no doubt by the knowledge that the Presbyterians outside were that week voting for a United Free Church of Scotland, and by the feeling that if it could support a principle in which Scottish Presbyterianism outside is absolutely

[1] More properly Sir James A. Campbell's.

[2] The Laymen's League, on the other hand, presented a petition in favour of Dr Mair's bill now brought in, because it "compares favourably with previous legislative proposals."

united, and by which the old Disruption would have been averted, it was bound to do so,—persisted in its vote. It was transacted, however, in a small House, and Lord Balfour of Burleigh took the unusual step of recording his dissent.

The Secretary for Scotland should not have deprecated parliamentary inquiry into the legal constitution of the Church of Scotland, especially of the kind proposed. A few weeks before he had contributed to a volume of 'Essays in Aid of Reform of the Church of England,' edited by Canon Gore (now Bishop of Worcester), a paper on the Principles and Conditions of the Scottish Establishment. In it Lord Balfour gave an excellent account of the administrative arrangements of the Church of Scotland. But for "the principles upon which the alliance between Church and State in Scotland is founded," he there referred exclusively to Dr Mair of Earlston,[1] whose Declaratory Bill he now viewed with alarm. And while absolutely ignoring in his essay *all* the great constitutional decisions as to that al-

[1] Dr Mair has his own difficulties with these principles. In his pamphlet on Ecclesiastical Jurisdiction (Blackwood's, 1896) he says: "Jurisdiction is a technical, judicial term. It has nothing to do with the power given by Christ. It means a power given to courts by the State alone." Of course this is in violent opposition to the principles of all Presbyterian Churches. But in the passage accepted by Lord Balfour of Burleigh as stating "the principles of the alliance," Dr Mair tries to put it otherwise: "As the word jurisdiction in the legal phraseology of the country means only that which is derived from the human head of the State, let us *for clearness* (!) designate the divine jurisdiction of the Churches as power of Church government. It is evident that, besides possessing this power, a Church may in addition possess jurisdiction if the State pleases and the Church accepts." But jurisdiction is not government: it is one of the functions of government. As Dr Mair says on the same page, it "*emanates* from the legislative power and royal prerogative"—*i.e.*, from the supreme government, in one case human, in the other divine. To confound government with one of its functions, the source with an emanation, is fatal to clearness. Besides, when it is added that while Church jurisdiction in Scotland "proceeds wholly from the State," it carries with it the State's acknowledgment of the other power, "of Church government, which belongs to the Church itself," the state of the law is really inverted. What was denied to the Church in 1843 was self-government. Jurisdiction—even final jurisdiction—was always conceded to it; and was only refused in 1843, in so far as based on the pretended (divine or) self-governing power.

liance, and also, of course, the settlement for the future which was based upon them by both Parliament and the Crown, he thought it right to conclude with the following twofold representation to his English readers:—

> The two points to which it seems to me important to direct notice are,
>
> That the State recognises a jurisdiction as inherent in the Church, and while adding to it and providing means whereby it can be carried into effect, does not profess to confer it *ab initio;*
>
> and further,
>
> That within her sphere the Church of Scotland possesses legislative power to regulate her own affairs as may from time to time be necessary without reference to any external authority whatever.[1]

The former proposition is of course that of the Church of Scotland before 1843, urged then by it in vain as the reason why, when the civil courts overruled its deliverances, it could not submit within the Church sphere and as to *spiritualia,* while (like the Bill approved by the Assembly of 1898) it submitted at once and implicitly as to "patrimonial rights and interests" involved. And the same proposition was rejected by the Court of Session[2] and the House of Lords—"Who gave them any jurisdiction? The law and that alone gave it"—partly because the distinction taken in the Assembly's Bill of 1898 was one which, they held, could never be sanctioned in a Church connected by statute with the State, and partly because that proposition, if admitted, would justify the Church in its carefully qualified resistance to all the decisions complained of in its Claim of Right of 1842.

But precarious as the Cabinet or the Church of England would find Lord Balfour of Burleigh's first legal proposition —as to jurisdiction—if either proposed to rest weight upon it, it is almost solid ground as compared with the second—as to legislation. That within her sphere the Church of Scotland possesses legislative power "to regulate her own

[1] Essays in Aid of the Reform of the Church. Edited by Charles Gore, M.A., D.D. London: John Murray, 1898. Page 100.

[2] See pp. 92, 93.

affairs as may from time to time be necessary without reference to any external authority whatever," is an assertion unsupported indeed, but at the same time so gravely misleading,[1] that no lawyer could in ordinary circumstances pass it by. Fortunately, the proceedings of the last General Assembly of the nineteenth, and the first of the twentieth century, in dealing with this very question, and with so central an application of it as the law of creeds, have conclusively relieved me from any duty of controversy. Following, therefore, the general plan adopted in the revision of this work—of allowing the historical development of the law to explain and defend itself—I shall transfer from the text to a footnote the views presented on this subject thirty-five years ago. Old as these views now are, it will be seen that the able and statesmanlike discussions which have recently taken place in the Supreme Court of the Church do not suggest any modification of them.[2] And I also retain, what is far more important, in Appendix M (p. 202), the judicial opinions delivered on this very question of legislative power.

[1] As a general statement, and in its obvious sense, it is absolutely baseless. If, however, by "her sphere" we understand the sphere to which the Church is called and confined by statute, and by "her own affairs" the affairs which statute empowers and obliges her to carry out, the whole sentence may become so ambiguous as to be reconcilable with the law. It would of course be so much the more perilous.

[2] *The legislative power of a Church as to creed* is either direct or indirect. It is either a power of dealing directly with articles of faith, in the way of framing or abolishing, enlarging or diminishing them—a *dogmatic power* proper; or it is a power of framing "constitutions" (Act 1592, c. 116) and regulations as to the administration of the creed, without interfering with the Confession itself. Of these in their order.

The direct or dogmatic power has certainly always been claimed in the Church of Scotland as theoretically pertaining to a Church; but if the law, as now defined, leaves it any such power at all, it is within the very narrowest limits. The Westminster Confession is made the general creed of the Church, and the personal creed of the teachers of the Church, by the Revolution statutes, into one of which every sentence of it is incorporated; and the authority of statute over the Church, as explained by the House of Lords, is absolute. Were these statutes not in existence, then, on the general principles laid down in the judg-

The proceedings of the last two Assemblies had an excellent foundation already laid in the enactments of those of 1888-89, with regard to subscription to the Con-

ments of 1843, a very nice question might arise. The question would then be, whether the creed was not so fundamental to the Church, so much a part of its constitution, that it would be *ultra vires* of the ecclesiastical body which stands on that constitution to alter it,—or otherwise, whether it might not be a civil injury to those who had entered the Church on the faith of it to do so. No one can study the cases in the conflict between the Court and the Assembly without seeing that very serious questions might conceivably arise, even if the creed of Scotland were unprotected by statute, and stood merely on ancient acceptance and immemorial use by the Church itself. But, in the meantime, the declaration by statute that it is (1690, c. 5) and shall be unalterably for ever (1707, c. 6) the public and avowed Confession of the Church of Scotland, makes the formal and direct abandonment of it, or any part of it, an impossibility. And the words equally negative any formal resolution to *ignore* either the whole Confession or any part of it.

If the power which Erskine ascribes to the Church of "*defining* or explaining articles of faith" refers to its legislative functions at all, and not wholly to its judicial, it can only be exercised within the limits of whatever creed the State has accepted or imposed;—in the present case, within the limits of the Westminster Confession. And with a Confession so large, elaborate, and minute as that of 1690, the range of freedom becomes very small indeed. But another question arises. The Church, it is acknowledged, cannot abolish or disavow its statutory creed, in whole or in part. But is it not free to add to it? It is to be "unalterably" the public Confession of the Church; but is it to be so exclusively? Can the Church not enlarge its Confession? In answer to this, it must be remembered, that though the Statute of 1690 does not expressly declare the Westminster Confession to be the Church's only standard, it does declare it to be its public and avowed Confession of Faith; and a Confession is as much changed by additions as it is by deductions. The mere utterance of a doctrinal manifesto by a General Assembly would not raise the difficulty. The difficulty would only emerge in the event of the Assembly desiring to bind its new manifesto permanently on the Church,—a proceeding the administrative effects of which (if any effect were given to it) would be undistinguishable from those caused by a simple and formal addition to the chapters of Westminster. In the one case as well as the other the objection that such additions are an unconstitutional interference with the statutory standard of the Church, would be sure to be raised. And the other objection, that by the proceeding proposed civil injuries were inflicted, would be more forcible in the case of addition to the creed than in that of subtraction from it. The *favor libertatis*, which is an attribute of law, would plead in this case very strongly. A man who could enter the Church under the statutory

fession. At that time the feeling in the Church against its too strict obligation to the doctrine of Westminster had come to a head, and a committee on the subject was

creed, might be repelled by any doctrinal utterance which the Church had added to it; and according to some of the cases decided, such an injury, especially if it has already led to distinct loss of status or money, is a sufficient ground for the civil courts being set in motion in the matter at the instance of the party aggrieved. Besides, not only does the addition to a Church's creed shut out members from it, but it imperils the safety of those who are already inside. At present the Westminster Confession, as established by law, seems to be a protection against the accusation of heresy to all who do not contravene it. The erecting of another permanent Confession alongside of it or subsidiary to it would enlarge the area of opinions condemned by authority and liable to censure. The more the matter is considered, it seems plain that the Church can no more add to the Confession of its faith than it can subtract from it.

There is an important distinction here between the dogmatic power which is exercised judicially, and a similar power attempted to be exercised legislatively. In one sense it is true that the Church courts *must* continually "define articles of faith," over and above those definitions which they have in the Confession. The presbytery or Assembly must explain and apply the doctrine of the Confession in each particular case of heresy that comes before it, as a part of its ordinary judicial and administrative action. Every "judgment of relevancy" in a heresy case is a doctrinal application of the Confession, and therefore a doctrinal addition to it. It is a finding that such and such an utterance libelled is or is not inconsistent with the truth of God and with the Confession. But the attempt, by way of overture or otherwise, to erect any of these momentary definitions into a permanent doctrinal rule of the Church, would appear to be equivalent to making a distinct addition to the standard. It would be a translating of the judicial function into a legislative one. (A milder way of doing this was suggested by Dr Fleming in the well-known case of Mr Campbell of Row—viz., that the Assembly has power to pass a *declaratory* Act, stating how it understands such and such a doctrine of the Confession. It does not appear that this change of form makes any difference in principle. The fate of the resolution proposed by Lord Moncreiff in 1834 is a memorable instance of the futility of the attempt to do what turns out to be not permitted by law, even under the form of a mere declaratory enactment. If this be a mere expression of opinion by the Assembly, it does no harm, and may be of use at a particular time. But if authority is attempted to be given it, it becomes a rival of the statutory creed, or at the least an addition to it. Its proper force is only equivalent to that of a very solemn decision by the Assembly in a judicial matter. In the case of such a decision the act of the Supreme Court of the Church will be much pondered by all its members and judicatories; but it is a mere precedent, and has no proper dogmatic

appointed. It was presided over by Dr Cuningham of Crieff, well known as a churchman and Church historian, who urged that the Assembly of 1888 should at once take

authority, either over succeeding Assemblies or over presbyteries. A declaratory enactment by the Assembly as to dogma seems to be in nearly the same position. It is the Act of an Assembly, not the law of the Church; and the attempt to strengthen it by passing it through the ordeal of the Barrier Act, as was also done in the case of the Veto, would be at least equally ineffectual.) While, therefore, as we shall see, the judicial function of the Church is almost unfettered, its legislative powers on all subjects are in modern times very much limited; and its direct legislative power as to creed—its dogmatic power—is cut away on both sides, and rendered probably almost *nil*, by the circumstance that that creed has already been statutorily fixed and declared.

. . . . .

But is statute the only legal limitation of the legislative power of the Church? Has the Assembly, with consent of the Church generally, power to innovate to any extent in all directions, provided only it does not impinge upon the provisions of positive statute? Without answering this rather difficult question, it may be remembered that the Church of Scotland is a body unquestionably possessed of continuity and corporate life of the highest kind, with a most important judicial and administrative jurisdiction guaranteed to it by law; and that it has a clear right to explicate that jurisdiction by making and remaking and altering all manner of by-laws and regulations. Yet, on the other hand, these alterations and innovations, it is equally clear, must not alter or impair its constitution. And it cannot be said that its constitution is wholly given it by statute. The Church was in existence, and had developed all its organs, and exercised all their powers, before statute came to sanction it; and these statutes confirm the constitution of the Church generally, while they specify some, and perhaps most, of its important features. Yet, if it shall turn out that any feature of that constitution, any fundamental element of the Church, has not been specified in the statutes, it would be premature to hold that it is on that account not binding, or that the Church has power to abrogate it. The great principle which the Court of Session and the House of Lords vindicated in the Auchterarder case was not the supremacy of statute, but the supremacy of civil law. In that case, indeed, it so happened that the law to which effect was given was expressed in a statute of Queen Anne; and the express law thus enacted was held to overbalance the vaguer constitutional presumptions urged on the other side. But where there is no express statute, there may still conceivably be immemorial law; and Church legislation may be as truly incompetent when it violates the latter as when it attacks the former.

. . . . .

The proposal to abolish any present practice, regulation, or "constitution" of the Church, will always raise in some minds a question of competency, even when there is no civil statute directly concerned. In such a case,

action—"other Churches were amending their subscriptions, and, in fact, something must be done." But the action recommended by the committee differed according to the position of the ministers' and elders' subscription respectively. It will be remembered that the statute of 1693 prescribed a form of subscription for ministers; that by the Assembly of 1694 this was accepted, and enacted not for ministers only but also (and by its own authority) for elders; and that in 1711 the Assembly made the subscription for ministers considerably stricter, leaving that for

the question whether the change is *ultra vires* would seem to depend on whether it affects the legal constitution of the Church; and whether any change affects that constitution, must turn very much on two points—the inherent magnitude of the change proposed, and the amount of authority (such as of the ecclesiastical documents) which must be set aside to carry out the innovation. Whether any of the documents is of so great authority as to be itself the law of the Church, which the Church therefore cannot change, we do not propose to discuss. Even if this is not so, the sanction of one or more of them, combined with immemorial practice, would give a strength to any existing Church arrangement which it would be perilous to tamper with. Ancient and uninterrupted usage is of weight, even on the question of legality, in an institution so venerable as the Church of Scotland. The contrary effect of disuse for a long period must also be kept in view. Recent and virid observance may in some cases give an authority equivalent to that which in others is conferred by centuries of age, followed by present disuse.

The difficulty of this complicated question is enhanced when we remember how little aid we can derive from past precedent on this matter. It would be very rash to stretch the present legislative powers of the Church so as to include all that the historical Church party (which disliked the name of legislation in the Church much more than it avoided the thing) chose to assert or to exercise. The records of the Church for three centuries show innumerable acts which nothing can justify but a feeling of Church independence, or at least an idea that the spiritual region and that with which the State had to do were distinct; and we are left to wonder, either that the union between Church and State could have continued so long, or, seeing that it did so continue, that the obvious and ancient question which recurred in 1834 was not by care and patriotism once more adjusted. But one result of this history is, that when the Church is now placed on a legal, if not a statutory basis, we are deprived of many of the precedents which its greatest men have struck out in its most critical times, and, in order to judge whether a proposal is *ultra vires*, have to look at the constitution of the Church apart from much of its history, and, in particular, apart from many of its legislative acts. (See Law of Creeds, first ed., pp. 187-196.)

elders untouched. The committee now proposed that as to ministers "the Church should revert to the formula contained in the Act of Parliament 1693." But as to elders, where there is no statute, they reported that they should be asked merely to "approve" of the Confession, and of "the doctrine of this Church;" instead of as hitherto declaring it to be the "true doctrine" and the "confession of my faith."[1] The change was influentially opposed, as at least premature, and as suggesting that the Assembly was "trying to get rid of its creed as far as it legally could;" and it was only carried by a vote of 87 to 82. But when carried it was at once acquiesced in, and the present doctrinal subscription of the Church of Scotland runs as follows:—

For Ministers.

I declare the Confession of Faith, approven by former General Assemblies of this Church and ratified by law in the year 1690, to be the confession of my faith, and I own the doctrine therein contained to be the true doctrine which I will constantly adhere to.

For Elders.

I hereby declare my approbation of the Confession of Faith, as approved by this Church and ratified by law in 1690; and I promise to submit myself to the discipline and Presbyterian government of the Church as established by law, and will never endeavour, directly or indirectly, the prejudice or subversion thereof.

These forms were passed through the "Barrier Act," with an Act of Assembly (Act 17, 1889) in the following well-judged and cautious terms:—

Whereas it is expedient that the formulas should be so revised and amended that they . . . should be in accordance with statute law, and so expressed as not to present any unnecessary impediment to the acceptance of office by duly qualified persons; for these causes . . . the General Assembly, while desiring by these changes to enlarge rather than curtail any liberty heretofore enjoyed, and to relieve subscribers from unnecessary burdens as to forms of expression and matters which do not enter into the substance of the faith, declare, at

[1] Dr Mair argues in his 'Digest of the Laws of the Church' that the approval of a doctrinal creed means approval, and therefore acceptance, of the doctrine. But the change of words is an important relaxation in the subscription.

the same time, the adherence of the Church to the Confession of Faith, as its public and avowed confession, and containing the sum and substance of the doctrine of the Reformed Churches.

The Act of 1889, though with difficulty passed, was not only acquiesced in, but was soon found to be inadequate, the pressure for relaxation having been rather on the side of the ministers, where there was still the barrier of statute. But its success was fitted to stir questions. The Church had changed by its own authority subscriptions, both for ministers and laymen, which had lasted for two centuries. Had those subscriptions been themselves lawfully imposed? If they could be now changed, was not this an act of real and serious legislation? And if so, was not the Church free to legislate on this matter, at least in so far as there is not positive restriction by statute? And might there not be some relief even from statute to a Church whose Confession of Faith, embedded in a greater statute, had given it the privilege "to determine controversies of faith," with the impressive declarations prefixed that "God alone is Lord of the conscience," and that "the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience and reason also"?

Such views, reinforced by a hopeful suggestion as to the effect on the Act of 1693 of a subsequent Revolution statute (that of 1695), brought the matter again to the front. It was not, however, till 1899 that the General Assembly, remembering that when there are difficulties as to the law it is sometimes useful to get a legal opinion, authorised its committee to take that course. The committee (Sir John Cheyne, Q.C., Procurator of the Church, convener) announced to the Assembly of 1900 that they had submitted to the Dean of Faculty (Mr Asher, Q.C.), Professor Rankine, Q.C., and Mr A. H. Briggs Constable, the following queries, and had received the subjoined answers.[1]

[1] From pp. 1209, 1210 of 'Reports on the Schemes of the Church of Scotland for the year 1900.' William Blackwood & Sons. These Reports, as published *after* the Assembly, contain its deliverances on what has been laid on the table.

QUERIES.

1. Have the provisions of the Act of Parliament 1693, c. 38, in regard to the subscription of the Confession of Faith and relative declaration by persons admitted to be ministers or preachers within the Church, been abrogated by subsequent legislation or in any other way, or are the said provisions still binding on the Church?

2. Would it be competent—having regard to the terms of the Act 1690, c. 7, and (*a*) on the assumption that the provisions of 1693, c. 38, referred to in query 1, are still in force, or (*b*) on the opposite assumption—for the General Assembly, with consent of the presbyteries of the Church, to enact a formula for ministers in these or similar terms: "I, A. B., approve of the above Confession of Faith, ratified by law in the year 1690, as the public and avowed Confession of this Church, and I declare the same to be the Confession of my faith, as containing the sum and substance of the doctrine of the Reformed Churches, and I own the doctrine therein contained" (*or*, alternatively, with the words "so far as it contains such sum and substance" substituted for the words "therein contained") "to be the true doctrine which I shall constantly adhere to"?

3. Can the Church lawfully impose upon persons entering her ministry a more stringent formula than is warranted by the Act of Parliament of 1693? *E.g.*, Could she lawfully revive the formula prescribed by the Assembly in 1711?

OPINION.

1. We are of opinion that the provisions of the Act 1693, c. 38, with regard to the subscription of the Confession of Faith and the relative declaration, have not been abrogated, and are still binding on the Church. We see nothing in the Act itself to indicate that it was intended to be simply a temporary measure, though some of its provisions were specially applicable to ministers then possessing churches but not yet admitted to the exercise of Church government. In these circumstances, we do not think that the subsequent statute of 1695 could operate as a repeal of the religious tests imposed in 1693, unless it did so expressly (as to which there is no question), or unless its provisions were necessarily inconsistent with the imposition of such tests.

[Counsel go on to give reasons against either suggestion.]

2. (*a*) On the assumption that the provisions of the Act of 1693 are still in force, it would not, in our opinion, be competent for the General Assembly to enact a formula for ministers in either of the alternative forms suggested. (*b*) On the opposite assumption, we are of opinion that either of the suggested forms would be competent;

but we are further of opinion that both of them are open to the objection of being ambiguous in material points.

3. We are of opinion that the Church could not lawfully impose a more stringent formula than is warranted by the Act of 1693. We further think that the formula prescribed in 1711 was more stringent than the statute warranted, and could not be lawfully revived.

The Opinion of

A. ASHER.
JOHN RANKINE.
A. H. B. CONSTABLE.

EDINBURGH, 28*th March* 1900.

The answer to the third query, as to the Act of Assembly of 1711, is an excellent illustration of Acts of the Church all through its past history, which were clearly competent to it on the theory which it put forward in 1843, but clearly incompetent according to the decisions against it then finally confirmed—Acts, therefore, which down to that date had been persistently questioned, as standing on doubtful ground. (Of course, there are many Acts of the State also, beginning with the famous Act of this very year 1711, of which precisely the same, *mutatis mutandis*, falls to be said.) But the first query was the really important one. Yet the second came to be equally valuable, for its ingenious proposals for changing the Formula, though negatived, seem to have suggested to the Assembly of 1900 that there might be other means conceivable of attaining the desired freedom. This view was strongly taken by Mr Vary Campbell, an accomplished lawyer whose career has all too suddenly closed; and on his motion, instead of recording the opinion, an "enlarged committee" was appointed to consider "the whole powers of the Church with regard to the Confession of Faith."[1] (The former committee was as to the

[1] Very curiously, it was in the same year and month that the General Assembly of the Presbyterian Church in the United States appointed a committee "to consider the whole matter of the restatement of the doctrines most surely believed among us, and which are substantially embodied in our Confession of Faith." The committee has consulted the whole presbyteries of the Church, and reports that they have difficulties as to whether it is best to revise certain chapters of the Confession, or to

"powers of the Church in regard to the Formula.") The larger committee was diligent, and ploughed up the whole ground allotted to it during the year before the General Assembly of 1901; where its report, presented on 27th May, and accompanied by two elaborate dissents, brought on an important discussion.

The first result was the complete confirmation of the Opinion of Counsel of the previous year. The official report assumed and proceeded upon it. There were two dissents; but the only dissent with a real difference agreed "that the opinion of counsel contained in the report of the previous committee may be accepted as correct." That opinion, it will be remembered, was that the Church could not alter the statutory formula of 1693 by relaxing it on the one hand, or making it more stringent on the other, or by adding to it a suggestion that the Confession is the "sum and substance" of the Faith. Principal Story, who represented the minority in debate, said, "They could not alter the formula which was embodied in the Act of Parliament. He believed, and he was sorry to say it, that the formula could not be altered." The Assembly, however, very wisely, did not formally adopt the legal opinion; and its reason was probably that expressed by Dr Mair of Earlston in proposing as the judgment of the House that it should receive (not adopt) the opinion of the present committee.

His reason for going no farther than to receive the report was not that he was in any doubt about the soundness of the opinion in the report. Nor was he in doubt as to whether the General Assembly would support that opinion. His reason was that the Church ought not to commit itself to any legal pronouncement upon a matter like this, for the Church would not have the last word on a question which

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sanction a Declaratory Act as to the doubtful points, or even to prepare a new and supplementary Confession for popular use, or to postpone doing anything. The Committee and the Presbyteries have no doubt that it is competent for the Church to do any of these things, if it desires it.

entered into the constitution of the Church. It would be the civil courts that would have the last word upon a matter like that.

Dr Mair must have forgotten, as indeed every other member of the House seems to have done, that just three years before it approved of a bill which declares that the Church should have the last word, and the authoritative word, on such questions, though not upon the "patrimonial rights and interests" which may be involved (as to which the civil courts are to be both final and authoritative). And it will be remembered that the outgoing Free Church selected this very matter of "right to the last word" as the test of domestic independence—for both partners, each in his or her own sphere. It was to be the test, not only upon constitutional questions generally, but expressly and eminently upon this question[1] of the freedom of the Church authoritatively to change its Confession of Faith, leaving it to the State to utter its equally authoritative word how the patrimonial rights and endowments which may be affected by such change are to be justly arranged.

But the Assembly, though it had forgot its counsel of perfection of 1898, was now very much in earnest, and the debate moved upon a high level of constitutional eloquence.[2] (That there should be a debate at all was ensured by the fact that Principal Story, the chairman of the committee, and Mr Vary Campbell, who had moved for it, were both in the minority.) But the conclusions of the report which they opposed, and which the Assembly ultimately received (rejecting their alternative dissent), were as follows:—

The Committee are clearly of opinion that it is not within the power of the Church to make any alteration in a document occupying such a position in the statutes of the realm; and that any declaration by the

[1] P. 86.

[2] The debate is so much upon our exact subject that I give it in full in Appendix L, from what seems to be an originally excellent report, which is also published in the 'Laymen's Book of the General Assembly of 1901' (Edinburgh, Hitt), with a preface by Lord Balfour of Burleigh.

Church which would have the effect of dispensing with, or being a substitute for, or adding to, anything in the Confession of Faith, would be unwarrantable and of no authority.

They then quote from ch. i. sec. 9, 10; ch. xx. sec. 2, and ch. xxxi. sec. 3, 4, of the Confession itself; and go on:—

It is said that such passages not only reserve the power but impose the duty, if need be, of revising and altering the Confession of Faith. If, however, this view should be granted (and the Committee have no wish to oppose it) there would remain the question, Under what conditions may the step be taken? This question can only be answered in the light of the facts that the Confession is embodied in an Act of Parliament and is established as the Confession of the Church as at present established, and that another Act of Parliament enjoins its being subscribed by preachers and ministers. Accordingly the Committee have no hesitation in saying that in their opinion it is not within the power of the Church *acting independently* to make any change in the Confession of Faith.

A paragraph follows as to the judicial powers of the Church, expressed with some exaggeration rather than inaccuracy, and ending quite properly with the statement that

it is therefore unnecessary to elaborate the matter, and it may be taken as certain that the Church courts have the supreme right to adjudicate in all cases of alleged error in doctrine, and that in the exercise of that right they cannot be controlled by the civil courts.

Conclusion.

In conclusion, the Committee would state the powers of the Church with regard to the Confession of Faith as follows: (1) The Church courts have in their judicial capacity the fullest powers in dealing with cases of alleged error in doctrine. (2) The Church may also by a declaratory Act explain or define doctrinal points as to which the Confession is ambiguous or silent. (3) But so long as the Act of 1690 remains in force, the Church has no power, by a declaratory Act or otherwise, to modify, abridge, or extend any article of the Confession.[1]

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[1] Besides Dr Story's and Mr Vary Campbell's dissent, another was tendered by Dr Hunter of Galashiels, but its conclusions do not seem to be at all more for freedom than the report itself was. Indeed this dissent avoids one concession which the report makes, that the Church "may by a

Such conclusions on the central and sacred matter of creed were unwelcome to a Church which has always desired to regulate its own affairs "without reference to any external authority." Accordingly, the motion to receive them was met with steadfast opposition, even when that motion was mitigated by the following addendum, moved by Dr Scott. It goes back to the matter of subscription, but relates chiefly to the Church's judicial power, which was not in question:—

> In resolving, in the meantime, to proceed no further in the matter, the General Assembly refer to their Act on Subscription of Office-Bearers in the Church (xvii. 1889), in which they declared their desire, by the changes then enacted, "to enlarge rather than curtail any liberty heretofore enjoyed, and to relieve subscribers from unnecessary burdens as to forms of expression and matters which do not enter into the substance of the faith." The General Assembly renew this declaration; and recognising that the complete and exclusive jurisdiction in all causes concerning the faith which is inherent in the Church of Christ, has been ratified and guaranteed to the Church of Scotland by national statutes, and that the Church's ultimate authority in all such matters are the holy Scriptures and the Holy Spirit, the General Assembly are confident that the office-bearers in the Church will so exercise its jurisdiction as not to oppress the consciences of any who, while owning the sum and substance of the doctrine of the Reformed Churches, are not certain as to some less important determinations also contained in it.

This did not sufficiently meet the difficulty even of the individual subscriber, and it did not deal at all with the newer question now raised as to the freedom of the Church itself.[1] Every Protestant Church claims the right in theory

declaratory Act explain or define doctrinal points as to which the Confession is ambiguous or silent"—a questionable position, were it not for the next sentence, which says that the Church cannot, even in this way, "*extend* any article" of the Confession.

[1] You cannot slip unawares from the plane of legislative freedom to that of judicial duty without a sense of shock. Thus the Right Hon. A. J. Balfour, in a debate on the Welsh Church on 1st April 1895, is reported to have said:—

"The Church of Scotland may alter its terms of subscription as it pleases." (No!) "Yes: it may define as it pleases the meaning which the subscription to the Westminster Confession carries with it."

So a Scottish county judge may alter the terms of trade contracts in

to utter its own Confession, but the Presbyterian Churches make the claim one of conscience and duty; and Mr Vary Campbell urged that as a matter of fact "at that present moment the only Presbyterian Church in the world which had not looked into its Confession and made some amendment on it was the Church of Scotland." And yet the free Presbyterian Churches, at least the greater bodies of that family on either side of the Atlantic, have very little quarrel with their Confession. They have been content (as we shall see in the second part of this volume) to expunge the items in which they have ceased to believe, or to rewrite in declaratory form what has been hitherto inadequately proclaimed. But the case of the Church of Scotland, as now put, required that it should have even more freedom than those outside. Principal Story, the head of a Scottish university and Divinity Hall, asserted roundly his belief that as to some more serious questions —the question of Particular Election and of a Limited Atonement—"hundreds of ministers in the Church of Scotland preached every Sunday that these, which were both doctrines of the Confession of Faith, were not true doctrines of the Church." And the minister of the historic Greyfriars' Church, Dr Glasse, pleaded that their difficulty with the Confession was not as to less important matters or accidental statements in it—it was as to "the essential principles of the Calvinistic theology," and "the essential principles of the Confession of Faith." Yet these statements, uncontradicted in the Assembly but not endorsed by it, were of less importance than the positive attitude of freedom towards both the State and its creed, taken up, alike in the alternative report [1] and in the debate, by

his county as he pleases. That is, he may define "as he pleases" the meaning which the contracts when made carry with them.

It must be remembered that the doctrine of the *animus imponentis* is always a doubtful one morally, when the subscription is itself unambiguous. But in the present case the very grievance was that the party *imponens* (subscription and creed too) is not the Church but the State.

[1] This report was disfigured by an attempt to found upon the worst and

what turned out to be not far from a majority of the House. These utterances were as manly and plain as those of any of the Free Churches—certainly as much so as those of the previous generations of the Scottish Church itself before it translated utterances into acts in the crisis of 1843. The appeal of the Confession to the Word as the ultimate standard in all cases was "not an accidental thing in it," Dr Story pointed out; it was vital. And "the idea of the Confession being confirmed and ratified by Act of Parliament" so as to interfere with that appeal from itself to Scripture was "inconsistent with the idea of Protestant freedom and of the Reformed religion." Whatever opinion, he added, might now be held "as to the Church's spiritual liberty in this regard, it was evident that two hundred years ago the Church believed in its right to revise its forms"—even of faith. And "no Act of Parliament could alter the plain meaning of the Confession as to the inherent rights of the Church in this *and other matters* of its own spiritual independence." Mr Vary Campbell followed, and pointed out (as had been so often pointed out to the Court in the cases of 1843) that these inherent

weakest part of the Confession—that which has been deleted or at least disavowed by the conscience of every Presbyterian Church in later times—the powers, namely, which it commits to the civil magistrate to punish irreligious opinions or practice. According to the third section of its twentieth chapter, he may proceed by his "power" against men who maintain practices, or merely publish opinions, provided they are contrary to the "known principles of Christianity," or to "the power of godliness," or even to "the external peace and order" of the Church. It was these views which made Geneva a stately prison in the time of Servetus, and sent Aikenhead to the gallows for denying the Trinity in Edinburgh in 1795 (the report eulogises the scheme of the Statute of Blasphemy of that year as compared with that of the Confession); and it was this "adjuration of the civil sword" which frustrated the reception of the Confession itself by the English Parliament and people. Yet it is "in the opinion of the committee according to the spiritual functions and duties of the Church to adopt expressly *this* scheme of the Confession" for working together the two swords—to adopt it instead of the theological or philosophical scheme upon which the Confession itself is framed, and, in particular, to use the former and not the latter "for dealing with questions and controversies of faith"!

rights were asserted even in this statutory creed. The power to determine controversies of faith was "undoubtedly legislative work," but it was claimed there, and he held that it "constituted an essential and characteristic freedom, franchise, or privilege of the Scottish Church, won after long struggles." When a right is inherent in the Church of Christ, and therefore in all Churches, it is perilous to speak of it as a privilege of one Church and a characteristic of it. But the speakers for freedom in the first Assembly of the twentieth century avoided the confusion, into which even the counsel for the Church at the crisis sixty years before sometimes fell. Like the Church itself, in its Claim of Right and elsewhere, they now claimed freedom in the Church's own sphere as an inherent right, asserted in the Confession as such. It was not derived from the State, but was confirmed by the State in and after Establishment so as to be in such circumstances a rare privilege, and even (among Established Churches) characteristic or unique. And this intelligent boldness had its reward. Like the judges of the majority in the old decisions, the framers of the official report (who included very able representatives of the Scottish Bar) were not able to deny that the Confession claimed this legislative power, and claimed it as essential to the Church. Indeed they had expressly put into their report[1] that they had no wish to oppose it. But they said once again, what had been laid down as law before, that however that may be, the Church as established had come into such a relation to the State and its statutes that it could no longer exercise this legislative independence. "The whole question was, Could they legislate?" So said Dr Mair, again the leading exponent of the "principles upon which the alliance between Church and State in Scotland is founded." "If the Church," he added, "which had already given one interpretation of Scripture in the form of the Confession of Faith, should change its mind and wish to put another interpretation on Scripture, they should

[1] See *supra*, p. 142.

do as their forefathers did, and go to the State and ask it to give effect to their desires." True, the "doctrine of the Confession" seemed to give the Church freedom to govern itself, and the Barrier Act seemed to provide means by which that freedom might be cautiously used.[1] Why was not that twofold provision put into the report which he now asked the Assembly to receive?

Because the Church of Scotland sixty years ago did bring through its Barrier Act some attempts on the government of the Church, and did meddle with and change that government, and split the Church. Men of those days, possessed by the same spirit that seemed to have entered into these dissentients, would not suffer the Church to rest night or day till they got *ultra vires* legislation through the Barrier Act, and brought about the split which they were now all mourning. The last paragraph in the other report showed that it was Spiritual Independence that had been all through in the minds of those who dissented. That phrase was an old friend and an ill-fated cry!

Dr Mair's able speech was really summed up in this concluding appeal; and Dr Scott, who again, as in 1898, lent his powerful support against the dissentients, did so simply because of their unfounded doctrine as to the powers of the Church,—"a doctrine which, if adopted by the General Assembly, would lead to a catastrophe as certainly as it occurred some sixty years ago." It was probably true; and the warning had behind it not only a national crisis but a mass of constitutional law. But the Assembly were not to be terrified into submission. The minority in it now grew far greater, proportionally, than it had originally been in the committee. And the two closing speakers on the other side held fast to the dangerous and honourable doctrine, name and thing. Professor Herkless of St Andrews said that for the Church to confess that it could not now give an interpretation of truth by Declaratory Act or in some effective way, would be

to take away that Spiritual Independence of which they had boasted, as being the birthright of the Church of Scotland, the tradition for

[1] Act of Ass. 9, 1697.

which they had long fought, and the most splendid word of the Church as a national institution.

And Dr Story, in his concluding speech, without repeating the splendid word, pressed with uncompromising energy the momentous thing,—supporting it alike with theological motives of the day, and more general aspirations for the time to come.

The serious question for them was, Were they to regard themselves as having any interest, liberty, and right in the Church to alter the Church's expression of doctrine and belief, or were they to be bound for all time to come—because it was evident that Dr Mair was not speaking for them only—by the extremest utterance of the extreme Calvinism of the seventeenth century? If that was to be so, if they were to have no redress, it was as well to note it, so that they might know where they were and what they had to do. If any man expected the Church of Scotland or any other Church in Christendom to live and flourish during the next hundred years upon the bald Calvinism of the Westminster Confession, he was, if he (Dr Story) read the signs of the times aright, most terribly mistaken. The Church would be rent asunder if they tried too long to crush the expression of its vitality. The Bishop of Peterborough once said that he would rather see England free than sober. He (Dr Story) would rather see the Church of Scotland free than the Church of Scotland tied and bound for all time to come with the fetters of Calvinism.

After some preliminary voting the Assembly divided, and while 146 voted for adopting the report of Dr Story and Mr Vary Campbell, 178 voted for receiving that of Dr Mair (and the committee) with the addendum proposed by Dr Scott.

Readers in England and abroad would make a mistake if they took too literally the protests in the Church of Scotland Assembly against Calvinism. These do not represent the attitude of the laity, which would be expressed much more by such temperate action as has been taken in Scotland by the Churches outside, and is now proposed in America. Such outbursts spring rather from the resentment of honourable men, who, having more need than their brethren

elsewhere to give effect to a change of view, find that they have less freedom to do it, and object to a chain irrespective of its weight.

Parliament could no doubt lighten, or lengthen, or remove it. But going to Parliament for a particular enactment is exposed to Dr Chalmers's objection in 1842, that to do so "when the thing in jeopardy is the enacting power, is bringing this power into greater jeopardy still."[1] And to go there claiming a more general "enacting power," along with the ancillary but vital power of jurisdiction, would be to raise the whole question supposed to have been settled for sixty years. It would raise more, and would go still farther back. For to revise the Revolution Settlement in the interest of one section of Presbyterians, not hitherto identified with Church freedom, would raise even in their minds the rights of Scotsmen outside, and would lay bare the fundamental injustice of the original Statutes of 1560 and 1567, of which Presbytery throughout the world has long been aware.

[1] Memoirs, iv. 284. "On this ground I would never ask from the Legislature a recognition of the principle of Non-Intrusion. It is a far greater thing which is at stake—the right of giving effect to this and every other principle of a purely spiritual nature."

APPENDIX TO BOOK I.

A.

THE SCOTTISH CONFESSION, AS RATIFIED IN 1560.

The Confession of the Faith professed and believed by the Protestantis within the realme of Scotland, publisched by thame in Parliament, and by the Estatis thareof ratifeit and aprovit, as holesome and sound doctrine, grounded upoun the infallibll treuthe of Godis Word.

> MATHEI xxiv.: And this glaid tydings of the kingdome sall be preiched throw the haill world, for a witnes unto all natiounis, and then sall the end cum.

The Preface.

The Estaites of Scotland, with the inhabitants of the same, professing Christ Jesus his holy Evangell, to thair naturall countreymen, and unto all uthers realmes and natiouns, professing the same Christ Jesus with thame, wissch grace, mercy, and peice from God the Father of our Lord Jesus Christ, with the spirit of rychteous jugement, for salutatioun.

Lang have we thristed (dear brethren) to have notified unto the warld the soum of that doctrine quhilk we profes, and for the quhilk we have susteined infamy and danger. But sick hes been the rage of Sathan against us, and against Christ Jesus his eternall verity laitly borne among us, that to this day na tyme hes bene granted unto us to cleir our consciences, as maist gladlie we wald have done; for how we have bene tossed a haill yeir past, the maist parte of Europe (as we suppois) dois understand. Bot seing that of the infinite gudeness of our God (quho never sufferethe His afflicted utterly to be confounded) above expectation, we have obteined sum rest and liberty, we culd not bot set furth this breve and plane Confessioun of sick doctrine as is

proponed unto us, and as we beleve and profes, partely for satisfactioun of our brethren, quhos hairts we dout not have bene and yet ar wounded by the despytfull raylling of sick as yet have not learned to speik well; and partely for stopping of the mouths of impudent blasphemers, quho bauldlie condemne that quhilk they have nouther hard nor understand. Not that we juge that the canckerit malice of sick is abill to be cured by this simple Confessioun; no, we knaw that the sweit savour of the Evangell is and sall be deyth to the sones of perditioun. But we have cheif respect to our waik and infirme brethrein, to quhome we wald communicat the bottom of our hairts, least that they be trubled and caryed away be diversities of rumours quhilk Satan sparseth contrair us, to the defeating of this our godlie interpryis: Protesting, That if any man will note in this our Confessions any artickle or sentence repugning to Godis holie Word, that it wald pleis him, of his gentilnes, and for Christiane cheriteis saik, to admonische us of the same in writte, and we of our honours and fidelitie do promeis unto him satisfactioun fra the mouthe of God—that is, fra His holie Scriptures, or ells reformatioun of that quhilk he sall prove to be amiss. For God we tak to record in our consciences, that from our hairts we abhore all sectis of heresie, and all teichers of erroneous doctrine; and that with all humilitie we embrace the puritie of Christ's Evangell, quhilk is the onelie fude of our saulls; and tharefore so precious unto us, that we ar determined to suffer the extremitie of warldlie danger, rather than that we will suffer ourselvis to be defrauded of the same: for heirof we ar maist certanely perswaidit, That quhosoever denys Christ Jesus, or is aschamed of Him, in presence of men, sall be denyed befor the Father, and befor His holie angells; and thairfoir, be the assistance of the michtie Spirit of the same Lord Jesus, we firmlie purpois to abyde to the end in the Confession of this our Fayth.

Chapters.

1. Of God.
2. Of the Creation of Man.
3. Of Original Sin.
4 Of the Revelation of the Promise.
5. The Continuance, Increase, and Preservation of the Kirk:—

We maist constantly beleeve that God preserved, instructed, multiplied, honoured, decored, and from death called to life, His Kirk in all ages fra Adam till the cumming of Christ Jesus in the flesh. . . .

6. Of the Incarnation of Christ Jesus.
7. Why it behoved the Mediator to be very God and very Man.

8. Election.
9. Christ's Death, Passion, Burial, &c.
10. Resurrection.
11. Ascension.
12. Faith in the Holy Ghost.
13. The Cause of Gude Warkes.
14. What Warkes ar reputed gude before God.
15. The Perfectioun of the Law, and Imperfectioun of Man.
16. Of the Kirk :—

As we believe in ane God—Father, Sonne, and Halie Ghaist—sa do we maist constantly believe, that from the beginning there hes bene, now is, and to the end of the warld sall be, ane Kirk; that is to say, ane company and multitude of men chosen of God, who richtly worship and imbrace Him, be trew faith in Christ Jesus, quha is the only Head of the same Kirk, quhilk alswa is the bodie and spouse of Christ Jesus; quhilk Kirk is catholike, that is, universal, because it conteinis the elect of all ages, all realmes, nations, and tounges, be they of the Jewes or be they of the Gentiles, quha have communion and societie with God the Father and with His Son Christ Jesus, throw the sanctificatioun of His Haly Spirit; and therefore is it called the communion, not of prophane persounes, bot of sancts, quha, as citizenis of the heavenly Jerusalem, have ye fruitioun of the maist inestimable benefites, to wit, of ane God, ane Lord Jesus, ane faith, and of ane baptisme: out of the quhilk Kirk there is nouther lyfe nor eternal felicitie. And therefore we utterly abhorre the blasphemie of them that affirme that men quhilk live according to equitie and justice sall be saved, quhat religioun that ever they have professed. For as without Christ Jesus there is nouther life nor salvatioun, so sall there nane be participant thereof bot sik as the Father hes given unto His Sonne Christ Jesus, and they that in time cum unto Him, avowe His doctrine, and beleeve into Him (we comprehend the children with the faithful parentes). This Kirk is invisible, knawen onelie to God, quha alane knawis whom He hes chosen, and comprehends alsweil (as said is) the elect that be departed, commonlie called the Kirk triumphant, and they that zit live and fecht against sinne and Sathan, as sall live hereafter.

17. The Immortalitie of the Saules.
18. Of the Notes be the quhilk the Trewe Kirk is decerned fra the False, and quha sall be Judge of the Doctrine. . . .
19. The Authoritie of the Scriptures :—

As we beleeve and confesse the Scriptures of God sufficient to instruct and make the man of God perfite, so do we affirme and avow the authoritie of the same to be of God, and neither to depend on men

nor angels. Wee affirme, therefore, that sik as allege the Scripture to have na uther authoritie bot that quhilk it hes received from the Kirk to be blasphemous against God, and injurious to the trew Kirk, quhilk alwayes heares and obeyis the voyce of her awin spouse and pastor, bot takes not upon her to be maistres over the samin.

20. Of General Councels, of their Power, Authoritie, and Cause of their Convention :—

As we do not rashlie damne that quhilk godly men, assembled together in general councel lawfully gathered, have proponed unto us, so without just examination dare we not receive quhatsoever is obtruded unto men under the name of general councels ; for plaine it is, as they wer men, so have some of them manifestlie erred, and that in matters of great weight and importance. So farre, then, as the councel provis the determination and commandement that it gives, bee the plaine Worde of God, so far do we reverence and imbrace the same. Bot gif men, under the name of a councel, pretend to forge unto us new artickles of our faith, or to make constitutionis repugning to the Word of God, then utterlie we must refuse the same as the doctrine of devils, quhilk drawis our saules from the voyce of our onlie God, to follow the doctrines and constitutiones of men. The cause, then, quhy that general councellis convened was nether to make ony perpetual law quhilk God before had not maid, nether zit to forge new artickles of our beleife, nor to give the Word of God authoritie, meikle les to make that to be His word, or zit the trew interpretation of the same, quhilk was not before, be His haly will, expressed in His Word ; bot the cause of councellis (we meane of sik as merite the name of councellis) wes partlie for confutation of heresies, and for giving publick confession of their faith to the posterite following, quhilk baith they did by the authoritie of God's written Word, and not by ony opinion or prerogative that they could not erre be reason of their general assemblie : and this we judge to have beene the chiefe cause of general councellis. The uther was for gude policie and ordour to be constitute and observed in the Kirk, quhilk (as in the house of God) it becummis all things to be done decently and into ordour. Not that we think that ane policie and ane ordour in ceremonies can be appoynted for all ages, times, and places ; for as ceremonies (sik as men have devised) ar bot temporal, so may and aucht they to be changed, when they rather foster superstition then that they edifie the Kirk using the same.

21. Of the Sacramentes.

22. Of the richt Administration of the Sacraments.

23. To whome Sacraments appertaine.

24. Of the Civil Magistrate :—

We confesse and acknawledge empyres, kingdomes, dominiouns,

and citties to be distincted and ordained be God; the powers and authoritie in the same, be it of emperours in their empyres, of kings in their realmes, dukes and princes in their dominions, and of uthers magistrates in fre citties, to be God's haly ordinance, ordained for manifestatioun of His awin glory, and for the singular profite and commoditie of mankind: so that whosoever goeth about to take away, or to confound the haill state of civile policies, now long established, we affirme the same men not onely to be enimies to mankinde, but also wickedly to fecht against God his expressed will. Wee farther confesse and acknawledge that sik persouns as are placed in authoritie ar to be loved, honoured, feared, and halden in most reverent estimatioun, because that they are the lieutennents of God, in whose sessiouns God himself dois sit and judge; zea, even the judges and princes themselves, to whom be God is given the sword, to the praise and defense of gude men, and to revenge and punish all open malefactors. Mairover, to kings, princes, rulers, and magistrates wee affirme that chieflie and most principallie the conservation and purgation of the religioun appertaines, so that not onlie they are appointed for civil policie, bot also for maintenance of the trew religioun, and for suppressing of idolatrie and superstitioun whatsoever; as in David, Josaphat, Ezechias, Josias, and uthers highlie commended for their zeale in that caice, may be espyed. And therefore wee confesse and avow that sik as resist the supreme power, doing that thing quhilk appertains to his charge, do resist God his ordinance, and therefore cannot be guiltles. And farther we affirme that whosoever denies unto them their ayde, counsel, and comfort, quhiles the princes and rulers vigilantly travel in execution of their office, that the same men deny their help, support, and counsel to God, quha be the presence of His lieutennent dois crave it of them.

25. The Guiftes freelie given to the Kirk.

Arise, O Lord! and let Thy enimies be confounded, let them flee from Thy presence that hate Thy godlie name. Give Thy servands strength to speake Thy word in bauldnesse, and let all natiouns cleave to Thy trew knawledge. Amen.

Thir Acts and Artickles ar red in the face of Parliament, and ratifyed be the three Estaitis of this Realm, at Edinburgh the 17 day of August, the zeir of God 1560 zeiris.

(*Note.*—The above Confession and the following statutes, printed from one of the older editions of the Scots Acts, are collated with Mr Thomson's Acts of the Parliaments of Scotland.)

B.

THE ACTS OF 1560 AS RE-ENACTED IN 1567.

1. Anent the Abolishing of the Pape, and his usurped Authoritie (Act 1567, c. 2).

Our soveraine lord, with advise of his dearest regent and three Estaitis of this present Parliament, ratifyis and apprevis the Act under-written, maid in the Parliament haldin at Edinburgh the 24 day of August, the zeir of God 1560 zeiris. And of new in this present Parliament, statutis and ordainis the said Act to be as ane perpetual law to all our soveraine lordis lieges in all times cumming. Of the quhilk the tenour followis: Item, the three Estaitis understanding that the jurisdictioun and authoritie of the Bischop of Rome, called the Pape, used within this realme in times bypast, hes not onely bene contumelious to the Eternal God, but also very hurtful and prejudicial to our soveraine's authoritie and commoun weill of this realme. Theirfoir has statute and ordained that the Bischop of Rome, called the Pape, have na jurisdictioun nor authoritie within this realme in ony time cumming. And that nane of our said soveraine's subjects, in ony times heirafter, sute or desire title or richt of the said Bischop of Rome or his sait to ony thing within this realme, under the paines of barratrie—that is to say, proscription, banishment, and never to bruke honour, office, nor dignitie within this realme. And the contraveners heirof to be called before the justice or his deputes, or before the Lords of the Session, and punisched therefoir, conforme to the lawes of this realme. And the furnischers of them with finance of money, and purchassers of their title of right, or maintainers or defenders of them, sall incurre the samin paines. And that na bischop nor uther prelat of this realme use ony jurisdictioun in time cumming be the said Bischop of Rome's authoritie, under the paine foirsaid. And therefoir of newe decernis and ordainis the contraveners of the samin, in ony time hereafter, to be punished according to the paines in the foirsaid Act above rehearsed.

2. Anent the Annulling of the Actes of Parliament made against God his Word, and Maintenance of Idolatrie in ony Times bypast (Act 1567, c. 3).

Item, Our soveraine lord, with advise of his dearest regent and three Estaitis of this present Parliament, ratifyis and apprevis the Acte

under-written, made in the Parliament haldin at Edinburgh the 24 day of August, the zeir of God ane thousand five hundreth three-score zeiris. And of new in this present Parliament statutis and ordainis the said Act to be as a perpetual law to all our soveraine lordis liegis in all times cumming. Of the quhilk the tenour followis: The quhilk day, forsameikle as there hes beene divers and sinnrie Acts of Parliament made in King James the First, Secund, Thrid, Fourt, and Fift times, kinges of Scotland for the time, and als in our soveraine ladie's tyme, not aggreing with God's haly Word, and be them divers persones tuke occasion to maintaine idolatrie and superstition within the Kirk of God, and repressing of sik persones as were professours of the said Word, quhairthrow divers innocents did suffer. And for eschewing of sik inconvenientes in time cumming, the three Estaitis of Parliament hes annulled, and declared all sik Acts made in times bypast, not agreing with God his Word, and now contrary to the Confessioun of Faith according to the said Word, published in this Parliament, to be of nane availe, force, nor effect. And decernis the said Acts, and every ane of them, to have na effect nor strength in time to cum, bot the samin to be abolished and extinct for ever, in sa far as any of the foirsaidis Acts are repugnant and contrarie to the Confessioun of Faith and Word of God foirsaid, ratyfied and approved be the Estaites in this present Parliament. And therefore decernis and ordainis the contraveners of the samin Act, in ony time hereafter, to be punisched according to the lawes. Of the quhilk Confession of the Faith the tenour followes.

(*In twenty-five chapters, as above printed, but without the Salutation and the Preface.*)

3. Anent the Messe abolished, and Punishing of all that hearis or sayis the samin (Act 1567, c. 5).

Item, Our soveraine lord, with advise of his dearest regent and the three Estaits of this present Parliament, ratifyis and apprevis the Act under-written, maid in the Parliament halden at Edinburgh the 23 day of August, the zeir 1560 zeiris. And of new in this present Parliament statutis and ordainis the said Act to be as an perpetual law to all our soveraine lord's lieges in all times to cum; of the quhilk the tenour followes: The quhilk day, forsameikle as Almichty God, be His maist trew and blessed Word, hes declared the reverence and honour quhilk suld be given unto Him; and be His Sonne Jesus Christ hes declared the trew use of the sacraments, willing the same to be used according to His will and Word. Be quhilk it is notour and perfitelie knawen that the sacramentes of baptisme and of the bodie and bloud

of Jesus Christ hes bene in all times bypast corrupted be the Papistical Kirk and be their usurped ministers. And presentlie, notwithstanding the reformatioun alreadie made, according to God's Word, zit not the less there is sum of the said Papis Kirk that stubburnely perseveris in their wicked idolatrie, sayand messe and baptizand conforme to the Papis Kirk, prophanand therethrow the sacraments foirsaides in quiet and secreete places, therethrow nouther regardand God nor His holy Word. Therefoire it is statute and ordained in this present Parliament that na maner of persoun or personnis, in onie time cumming, administrat ony of the sacraments foirsaids, secreetly or ony uther maner of way, but they that are admitted and havand power to that effect. And that na maner of persoun or persounis say messe, nor zit hear messe, nor be present theirat, under the paine of confiscatioun of all their gudis, movabil and unmovabil, and punishing of their bodyes, at the discretioun of the magistrat within quhais jurisdictioun sik personnis happinnis to be apprehended, for the first fault; banishing of the realme for the second fault; and justifying to the death for the thrid fault. And ordainis all schireffes, stewards, baillies, and their deputes, provestes and baillies of burrowes, and uthers judges quhatsumever within this realme, to take diligent sute and inquisitioun within their bounds quhair ony sik usurped ministerie is used, messe saying, or they that beis present at the doing thereof, ratifyand and approovand the samin, and take and apprehend them to the effect that the paines above written may be execute upon them. And therefore of new decernis and ordaines the contraveneris of the samin, in ony tyme heirafter, to be punished according to the paines of the aforesaid Acte above rehearsed.

C.

ACTS DECLARING THE TRUE CHURCH, AND AS TO THE KING'S OATH.

1. Anent the Trew and Haly Kirk, and of them that ar declared not to be of the samin (Act 1567, c. 6).

Item, Forasmeikle as the ministers of the blessed Evangel of Jesus Christ, whom God of His mercie hes now raised up amangst us, or heirafter sall rayse, agreeing with them that now livis in doctrine and administratioun of the sacraments, and the peopil of this realme that professis Christ as He now is offered in His Evangel, and do communicat with the haly sacraments (as in the reformed Kirkes of this

realme they are publicklie administrat) according to the Confessioun of the Faith : Our soveraine lord, with advise of my lord regent and three Estaitis of this present Parliament, hes declared and declaris the foresaid Kirk to be the onely true and halie Kirk of Jesus Christ within this realme. And decernis and declaris that all and sindrie quha outher gainsayis the word of the Evangel received and approved, as the heades of the Confessioun of Faith professed in Parliament of before, in the zeir of God 1560 zeires, as also specified in the Actes of this Parliament mair particularlie dois expresse, and now ratifyed and approoved in this present Parliament, or that refusis the participatioun of the halie sacramentes as they are now ministrat, to be na members of the said Kirke within this realme now presently professed, sa long as they keep themselves sa divided fra the society of Christ's bodie.

2. Anent the King's Aith, to be given at his Coronation (Act 1567, c. 8).

Item, Because that the increase of vertew and suppressing of idolatrie craves that the prince and the people be of ane perfite religioun, quhilk of God's mercie is now presently professed within this realme, theirfore it is statute and ordained be our soveraine lord, my lord regent, and three Estaites of this present Parliament, that all kinges and princes, or magistrates whatsoever halding their place, quhilkis hereafter in ony time sall happen to reigne and beare rule over this realme, at the time of their coronatioun and receipt of their princely authoritie, make their faithful promise be aith, in presence of the Eternal God, that induring the haill course of their lyfe they sall serve the samin Eternal God to the uttermost of their power, according as He hes required in His maist haly Word, reveiled and contained in the New and Auld Testaments. And according to the samin Worde sall mainteine the trew religion of Jesus Christ, the preaching of His halie Word, and dew and richt ministration of the sacraments now received and preached within this realme ; and sall abolish and gainstand all fals religioun contrare to the samin ; and sall rule the peopil committed to their charge according to the will and commaund of God, reveiled in His foresaide Word, and according to the lovabil lawes and constitutions received in this realme na wise repugnant to the said Word of the Eternal God ; and sall procure to the uttermaist of their power, to the Kirk of God and haill Christian peopil, trew and perfite peace in all time cumming. The richtis and rentis, with all just priviledges of the Crowne of Scotland, to preserve and keip inviolated, nouther sall they transfer nor alienate the samin. They sall forbid and represse, in all estaites and degries, reif, oppressioun, and all kinde of

wrang. In all judgementes they sall command and procure that justice and equitie be keiped to all creatures, without exception, as the Lord and Father of all mercyis be merciful to them. And out of their landes and empyre they sall be careful to rute out all heretikes and enimies to the trew worship of God, that sall be convict be the trew Kirk of God of the foirsaidis crymes. And that they sall faithfullie affirme the things above written be their solemne aith.

Between these Acts stands the Statute 1567, c. 7.

That the examination and admission of ministers within this realm be only in power of the Kirk, now openly and publicly professed within the same; the presentation of lawit patronages always reserved to the just and ancient patrons.

D.

ACTS OF 1579.

1. Anent the Trew and Haly Kirk, and them declared to be not of the samin (Act 1579, c. 68; in Thomson's Acts, c. 6. iii. 137).

This is the ratification of Act 1567, c. 6 (see page 157): "Ordaining the same to be here insert of new, because of sum defection and informalitie of words in default of the prenter." We have given the corrected form in the text (pp. 15, 16), and need not repeat it. It is followed by—

2. Anent the Jurisdiction of the Kirk (Act 1579, c. 69).

Our soveraine lord, with advise of his three Estaites of this present Parliament, hes declared and granted jurisdiction to the Kirk, quhilk consistis and stands in the preaching of the trew Worde of Jesus Christ, correction of maners, and administration of the halie sacraments, and declairis that there is na uther face of kirk, nor uther face of religion, then is presentlie be the favour of God establisched within this realm, and that there be na uther jurisdiction ecclesiastical acknowledged within this realme uther than that quhilk is and sall be within the samin Kirk, or that quhilk flowis theirfra, concerning the premisses. (Then follows the appointment of a Commission.)

E.

ACT RATIFYING THE PRESBYTERIAN ORDER OF THE CHURCH. 1592.

Ratification of the Liberty of the Trew Kirk; of General and Synodal Assemblies; of Presbyteries; of Discipline; all Lawes of Idolatrie are abrogate; of Presentation to Benefices (Act 1592, c. 116).[1]

Our soveraine lord and Estaites of this present Parliament, following the lovabil and gude exemple of their predecessours, hes ratified and appreeved, and be the tenour of this present Act ratifies and apprevis, all liberties, priviledges, immunities, and freedomes quhatsumever, given and granted be his hienesse, his regentes in his name, or ony of his predecessours, to the trew and halie Kirk, presently established within this realm, and declared in the first Act of his hienesse' Parliament, the twentie day of October, the zeir of God ane thousand five hundreth threescoir ninetene zeires; and all and quhatsumever Actes of Parliament and statutes maid of before be his hienesse and his regentes, anent the liberty and freedome of the said Kirk; and specially the first Act of the Parliament halden at Edinburgh the twentie-foure daie of October, the zeir of God ane thousand five hundreth fourscore ane zeires, with the haill particular Acts there mentioned, quhilk sall be als sufficient as gif the samin were here expressed; and all uther Acts of Parliament maid sensine in favour of the trew Kirk; and siklike ratifies and appreivis the General Assemblies appointed be the said Kirk; and declares that it sall be lauchfull to the Kirk and ministers, everilk zeir at the least, and oftner *pro re nata* as occasion and necessity sall require, to hald and keepe Generall Assemblies, providing that the king's majesty, or his commissioners with them to be appoynted be his hienesse, be present at ilk Generall Assemblie before the dissolving thereof, nominate and appoynt time and place quhen and quhair the nixt Generall Assembly sall be halden. And in case naither his majesty nor his said commissioner beis present for the time in that toun quhair the said General Assembly beis halden, then and in that case it sall be lesum to the said General Assemblie, be themselves, to nominate and appoynt time and place quhair the nixt Generall Assembly of the Kirk sall be keiped and halden, as they have bene in use to do thir

[1] In the Acts of the Parliament (Thomson, iii. 541) this Act is entitled, 'Act for abolisching of the Actis contrair the Trew Religion.'

times bypast. And als ratifies and apprevis the synodicall and provinciall assemblies to be halden be the said Kirk and ministers twise ilk zeir, as they have bene and ar presently in use to do, within every province of this realme. And ratifies and apprevis the presbyteries and particular sessiones appoynted be the said Kirk, with the haill jurisdiction and discipline of the same Kirk, aggried upon be his majesty in conference had be his hienesse with certaine of the ministrie conveened to that effect, of the quhilkes articles the tenour followes: Maters to be intreated in Provincial Assemblies.—Thir assemblies ar constitute for weichtie maters, necessar to be intreated be mutual consent and assistance of brethren within the province, as neede requiris. This assembly hes power to handle, ordour, and redresse all thinges omitted or done amisse in the particular assemblies. It hes power to depose the office-bearers of that province for gude and just cause deserving deprivation; and generally, thir assemblies hes the haill power of the particular eldershippes quhairof they are collected. Maters to be intreated in the Presbyteries.—The power of the presbyteries is to give diligent laboures in the boundes committed to their charge; that the kirkes be keeped in gude ordour; to inquire diligently of naughty and ungodly persons, and to travel to bring them in the way againe be admonition, or threatning of Gods judgements, or be corection. It appertaines to the elderschippe to take heede that the Word of God be purely preached within their boundes, the sacramentes richtly ministered, the discipline interteined, and ecclesiastical guddes uncorruptly distributed. It belangis to this kinde of assemblies to cause the ordinances maid be the assemblies, provincialles, nationals, and generals, to bee keeped and put in execution, to make constitutions, quhilk concernis to prepon in the Kirk, for decent ordour in the particular kirk quhair they governe, providing that they alter na rules maid be the provincial or general assemblies, and that they make the provincial assemblies foresaids privy of the rules that they sall make; and to abolish constitutiones tending to the hurt of the same. It hes power to excommunicate the obstinate, formal proces being led and dew interval of times observed. Anent particular Kirks, gif they be lauchfully ruled be sufficient Ministers and Session.—They have power and jurisdiction in their awin congregation in maters ecclesiastical. And decernis and declaris the saids assembles, presbyteries, and sessiounes, jurisdiction and discipline thereof foresaid, to be in all times cumming maist just, gude, and godly in the selfe; notwithstanding of quhatsumever statutes, actes, canone, civill, or municipal lawes made in the contrare. To the quhilkis and every ane of them, thir presentes sall make expresse derogation. And because there ar divers Actes of Parliament maid

in favour of the Papistical Kirke, tending to the prejudice of the liberty of the trew Kirk of God presently professed within this realme, jurisdiction and discipline thereof, quhilk stands zit in the buikes of the Actes of Parliament nocht abrogated nor annulled, therefore his hienesse and Estaites foresaids hes abrogated, cassed, and annulled, and be the tenour hereof abrogatis, cassis, and annullis, all Actes of Parliament maid be ony of his hienesse' predecessoures for maintenance of superstition and idolatry, with all and quhatsumever acts, lawes, and statutes maid at ony time before the daye and dait hereof against the liberty of the trew Kirk, jurisdiction and discipline thereof, as the samin is used and exercised within this realme.

And in speciall, that part of the seventh Act of Parliament halden at Striviling the fourth day of November, the zeir of God ane thousand four hundreth fourty-three zeires, commaunding obedience to be given to Eugenius, the Paipe for the time; the Acte maid be King James the Thrid, in his Parliament halden at Edinburgh the twenty-four day of Februar, the zeir of God ane thousand four hundreth fourscor zeires. And all utheris Actes quhairby the Paipis authority is established; the 47 Acte of King James the Thrid, in his Parliament halden at Edinburgh the twenty day of November, the zeir of God ane thousand four hundreth threescore nine zeires, anent the Satterday and uther vigiles to be halie dayes, from even-sang to even-sang.

Item, That part of the Act maid be the queene-regent in the Parliament halden at Edinburgh the first day of Februar, the zeir of God ane thousand five hundreth fifty-ane zeires, giving speciall licence for holding of Pasche and Zule. Item, The kingis majesty and Estaites foresaidis declaris that the second Acte of the Parliament halden at Edinburgh the xxij day of Maij, the zeir of God ane thousand five hundreth fourscoir four zeires, sall na wayes be prejudiciall nor derogate ony thing to the priviledge that God hes given to the spirituall office-bearers in the Kirk, concerning heads of religion, maters of heresie, excomunication, collation or deprivation of ministers, or ony siklike essentiall censours, speciallie grounded and havand warrand of the Word of God. Item, Our soveraine lord and Estaites of Parliament foresaids abrogatis, cassis, and annullis the 20 Act of the same Parliament, halden at Edinburgh the said zeir ane thousand five hundreth fourscoir four zeires, granting commission to bischoppes and utheris judges, constitute in ecclesiasticall causes, to receive his hienesse' presentationes to benefices, to give collation thereupon, and to put ordour in all causes ecclesiasticall; quhilk his majesty and Estaites foresaidis declaris to be expired in the selfe, and to be null in time cumming and of nane availl, force, nor effect. And

therefore ordainis all presentations to benefices to be direct to the particular presbyteries in all time cumming, with full power to give colation thereupon; and to put ordour to all maters and causes ecclesiasticall within their boundes, according to the discipline of the Kirk; providing the foresaids presbyteries be bound and astricted to receive and admitt quhatsumever qualified minister, presented be his majesty or uther laick patrones.

F.

THE WESTMINSTER CONFESSION OF FAITH.

Chapters.

1. Of the Holy Scripture :—

1. Although the light of nature, and the works of creation and providence, do so far manifest the goodness, wisdom, and power of God, as to leave men inexcusable; yet they are not sufficient to give that knowledge of God, and of His will, which is necessary unto salvation: therefore it pleased the Lord, at sundry times and in divers manners, to reveal Himself, and to declare that His will unto His Church; and afterwards, for the better preserving and propagating of the truth, and for the more sure establishment and comfort of the Church against the corruption of the flesh, and the malice of Satan and of the world, to commit the same wholly unto writing; which maketh the Holy Scripture to be most necessary; those former ways of God's revealing His will unto His people being now ceased. 2. Under the name of Holy Scripture, or the Word of God written, are now contained all the Books of the Old and New Testaments, which are these— . . . All which are given by inspiration of God, to be the rule of faith and life. 3. The Books commonly called Apocrypha, not being of Divine inspiration, are no part of the canon of the Scripture; and therefore are of no authority in the Church of God, nor to be any otherwise approved, or made use of, than other human writings. 4. The authority of the Holy Scripture, for which it ought to be believed and obeyed, dependeth not upon the testimony of any man or Church, but wholly upon God (who is truth itself), the author thereof; and therefore it is to be received, because it is the Word of God. 5. We may be moved and induced by the testimony of the Church to an high and reverend esteem of the Holy Scripture, and the heavenliness of the matter, the efficacy of the

doctrine, the majesty of the style, the consent of all the parts, the scope of the whole (which is to give all glory to God), the full discovery it makes of the only way of man's salvation, the many other incomparable excellences, and the entire perfection thereof, are arguments whereby it doth abundantly evidence itself to be the Word of God; yet, notwithstanding, our full persuasion and assurance of the infallible truth and Divine authority thereof, is from the inward work of the Holy Spirit, bearing witness by and with the word in our hearts. 6. The whole counsel of God, concerning all things necessary for His own glory, man's salvation, faith, and life, is either expressly set down in Scripture, or by good and necessary consequence may be deduced from Scripture: unto which nothing at any time is to be added, whether by new revelations of the Spirit, or traditions of men. Nevertheless, we acknowledge the inward illumination of the Spirit of God to be necessary for the saving understanding of such things as are revealed in the Word; and that there are some circumstances concerning the worship of God, and government of the Church, common to human actions and societies, which are to be ordered by the light of nature and Christian prudence, according to the general rules of the Word, which are always to be observed. 7. All things in Scripture are not alike plain in themselves, nor alike clear unto all; yet those things which are necessary to be known, believed, and observed, for salvation, are so clearly propounded and opened in some place of Scripture or other, that not only the learned, but the unlearned, in a due use of the ordinary means, may attain unto a sufficient understanding of them. 8. The old Testament in Hebrew (which was the native language of the people of God of old), and the New Testament in Greek (which at the time of the writing of it was most generally known to the nations), being immediately inspired by God, and by His singular care and providence kept pure in all ages, are therefore authentical; so as in all controversies of religion, the Church is finally to appeal unto them. But because these original tongues are not known to all the people of God, who have right unto and interest in the Scriptures, and are commanded, in the fear of God, to read and search them, therefore they are to be translated into the vulgar language of every nation unto which they come, that the word of God dwelling plentifully in all, they may worship Him in an acceptable manner, and, through patience and comfort of the Scriptures, may have hope. 9. The infallible rule of interpretation of Scripture is the Scripture itself; and, therefore, when there is a question about the true and full sense of any Scripture (which is not manifold, but one), it must be searched and known by other places that speak more clearly. 10. The supreme Judge, by which all controversies of religion are to be determined, and all decrees of councils, opinions of

ancient writers, doctrines of men, and private spirits, are to be examined, and in whose sentence we are to rest, can be no other but the Holy Spirit speaking in the Scripture

2. Of God, and of the Holy Trinity.
3. Of God's Eternal Decree.
4. Of Creation.
5. Of Providence.
6. Of the Fall of Man, of Sin, and of the Punishment thereof.
7. Of God's Covenant with Man.
8. Of Christ the Mediator.
9. Of Free Will.
10. Of Effectual Calling.
11. Of Justification.
12. Of Adoption.
13. Of Sanctification.
14. Of Saving Faith.
15. Of Repentance unto Life.
16. Of Good Works.
17. Of the Perseverance of the Saints.
18. Of Assurance of Grace and Salvation.
19. Of the Law of God.
20. Of Christian Liberty, and Liberty of Conscience:—

2. God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men which are in anything contrary to His Word, or beside it, in matters of faith or worship. So that to believe such doctrines, or to obey such commandments out of conscience, is to betray true liberty of conscience; and the requiring of an implicit faith, and an absolute and blind obedience, is to destroy liberty of conscience, and reason also. 3. They who, upon pretence of Christian liberty, do practise any sin, or cherish any lust, do thereby destroy the end of Christian liberty; which is that, being delivered out of the hands of our enemies, we might serve the Lord without fear, in holiness and righteousness before Him, all the days of our life. 4. And because the powers which God hath ordained, and the liberty which Christ hath purchased, are not intended by God to destroy, but mutually to uphold and preserve one another; they who, upon pretence of Christian liberty, shall oppose any lawful power, or the lawful exercise of it, whether it be civil or ecclesiastical, resist the ordinance of God. And for their publishing of such opinions, or maintaining of such practices, as are contrary to the light of nature, or to the known principles of Christianity, whether concerning faith, worship, or conversation; or to the power of godliness; or such erroneous opinions or practices, as either in their own nature, or in the manner of publishing or maintaining them, are destructive to the

external peace and order which Christ hath established in the Church; they may lawfully be called to account, and proceeded against by the censures of the Church, and by the power of the civil magistrate.

21. Of Religious Worship and the Sabbath-day.

22. Of Lawful Oaths and Vows.

23. Of the Civil Magistrate :—

1. God, the supreme Lord and King of all the world, hath ordained civil magistrates to be under Him over the people, for His own glory, and the public good; and, to this end, hath armed them with the power of the sword, for the defence and encouragement of them that are good, and for the punishment of evil-doers. 2. It is lawful for Christians to accept and execute the office of a magistrate, when called thereunto: in the managing whereof, as they ought especially to maintain piety, justice, and peace, according to the wholesome laws of each commonwealth; so, for that end, they may lawfully, now under the New Testament, wage war upon just and necessary occasions. 3. The civil magistrate may not assume to himself the administration of the Word and sacraments, or the power of the keys of the kingdom of heaven; yet he hath authority, and it is his duty, to take order, that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof, he hath power to call synods, to be present at them, and to provide that whatsoever is transacted in them be according to the mind of God. 4. It is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority for conscience' sake. Infidelity, or difference in religion, doth not make void the magistrate's just and legal authority, nor free the people from their due obedience to him; from which ecclesiastical persons are not exempted; much less hath the Pope any power or jurisdiction over them in their dominions, or over any of their people; and least of all to deprive them of their dominions or lives, if he shall judge them to be heretics, or upon any other pretence whatsoever.

24. Of Marriage and Divorce.

25. Of the Church :—

1. The catholic or universal Church, which is invisible, consists of the whole number of the elect that have been, are, or shall be gathered into one, under Christ the Head thereof; and is the spouse, the body, the fulness of Him that filleth all in all. 2. The visible Church, which is also catholic or universal under the Gospel (not confined to

one nation, as before under the law), consists of all those throughout the world that profess the true religion, together with their children; and is the kingdom of the Lord Jesus Christ, the house and family of God, out of which there is no ordinary possibility of salvation. 3. Unto this catholic visible Church Christ hath given the ministry, oracles, and ordinances of God, for the gathering and perfecting of the saints in this life, to the end of the world; and doth by His own presence and Spirit, according to His promise, make them effectual thereunto. 4. This catholic Church hath been sometimes more, sometimes less visible. And particular Churches, which are members thereof, are more or less pure, according as the doctrine of the Gospel is taught and embraced, ordinances administered, and public worship performed more or less purely in them. 5. The purest Churches under heaven are subject both to mixture and error; and some have so degenerated as to become no Churches of Christ, but synagogues of Satan. Nevertheless, there shall be always a Church on earth to worship God according to His will. 6. There is no other Head of the Church but the Lord Jesus Christ; nor can the Pope of Rome in any sense be head thereof; but is that Antichrist, that man of sin, and son of perdition, that exalteth himself in the Church against Christ and all that is called God.

26. Of Communion of Saints:—

1. . . . 2. Saints, by profession, are bound to maintain an holy fellowship and communion in the worship of God, and in performing such other spiritual services as tend to their mutual edification; as also in relieving each other in outward things, according to their several abilities and necessities. Which communion, as God offereth opportunity, is to be extended unto all those who in every place call upon the name of the Lord Jesus.

27. Of the Sacraments.

28. Of Baptism.

29. Of the Lord's Supper.

30. Of Church Censures:—

1. The Lord Jesus, as King and Head of His Church, hath therein appointed a government in the hand of Church-officers, distinct from the civil magistrate. . . .

31. Of Synods and Councils:—

1. For the better government and further edification of the Church, there ought to be such assemblies as are commonly called Synods or Councils. 2. As magistrates may lawfully call a synod of ministers, and other fit persons, to consult and advise with about matters of religion; so if magistrates be open enemies to the Church, the ministers of Christ, of themselves, by virtue of their office, or they, with other fit persons upon delegation from their churches, may meet to-

gether in such assemblies. 3. It belongeth to synods and councils ministerially to determine controversies of faith, and cases of conscience; to set down rules and directions for the better ordering of the public worship of God, and government of His Church; to receive complaints in cases of maladministration, and authoritatively to determine the same: which decrees and determinations, if consonant to the Word of God, are to be received with reverence and submission, not only for their agreement with the Word, but also for the power whereby they are made, as being an ordinance of God, appointed thereunto in His Word. 4. All synods or councils since the apostles' times, whether general or particular, may err, and many have erred; therefore they are not to be made the rule of faith or practice, but to be used as an help in both. 5. Synods and councils are to handle or conclude nothing but that which is ecclesiastical; and are not to intermeddle with civil affairs, which concern the commonwealth, unless by way of humble petition, in cases extraordinary; or by way of advice for satisfaction of conscience, if they be thereunto required by the civil magistrate.

32. Of the State of Men after Death, and of the Resurrection of the Dead.

33. Of the Last Judgment.

G.

ACT OF THE GENERAL ASSEMBLY APPROVING THE CONFESSION OF FAITH, 27TH AUGUST 1647.

A Confession of Faith for the Kirks of God in the three kingdoms, being the chiefest part of that uniformity in religion, which, by the Solemn League and Covenant, we are bound to endeavour: And there being accordingly a Confession of Faith agreed upon by the Assembly of Divines sitting at Westminster, with the assistance of Commissioners from the Kirk of Scotland; which Confession was sent from our Commissioners at London to the Commissioners of the Kirk met at Edinburgh in January last, and hath been in this Assembly twice publicly read over, examined, and considered; copies thereof being also printed, that it might be particularly perused by all the members of this Assembly, unto whom frequent intimation was publicly made, to put in their doubts and objections, if they had any: And the said Confession being, upon due examination thereof, found by the Assembly to be most agreeable to the Word of God, and in nothing con-

trary to the received doctrine, worship, discipline, and government of this Kirk: And, lastly, It being so necessary, and so much longed for, that the said Confession be, with all possible diligence and expedition, approved and established in both kingdoms, as a principal part of the intended uniformity in religion, and as a special means for the more effectual suppressing of the many dangerous errors and heresies of these times; the General Assembly doth therefore, after mature deliberation, agree unto, and approve the said Confession, as to the truth of the matter (judging it to be most orthodox, and grounded upon the Word of God); and also, as to the point of uniformity, agreeing for our part, that it be a common Confession of Faith for the three kingdoms. The Assembly doth also bless the Lord, and thankfully acknowledge His great mercy, in that so excellent a Confession of Faith is prepared, and thus far agreed upon in both kingdoms; which we look upon as a great strengthening of the true Reformed religion against the common enemies thereof. But, lest our intention and meaning be in some particulars misunderstood, it is hereby expressly declared and provided, That the not mentioning in this Confession the several sorts of ecclesiastical officers and assemblies, shall be no prejudice to the truth of Christ in these particulars, to be expressed fully in the Directory of Government. It is further declared, That the Assembly understandeth some parts of the second article of the thirty-one chapter only of kirks not settled, or constituted in point of government: And that although, in such kirks, a synod of ministers, and other fit persons, may be called by the magistrate's authority and nomination, without any other call, to consult and advise with about matters of religion; and although, likewise, the ministers of Christ, without delegation from their churches, may of themselves, and by virtue of their office, meet together synodically in such kirks not yet constituted, yet neither of these ought to be done in kirks constituted and settled; it being always free to the magistrate to advise with synods of ministers and ruling elders, meeting upon delegation from their churches, either ordinarily, or, being indicted by his authority, occasionally, and *pro re nata;* it being also free to assemble together synodically, as well *pro re nata* as at the ordinary times, upon delegation from the churches, by the intrinsical power received from Christ, as often as it is necessary for the good of the Church so to assemble, in case the magistrate, to the detriment of the Church, withhold or deny his consent; the necessity of occasional assemblies being first remonstrate unto him by humble supplication.

H.

1. Act Ratifying the Confession of Faith, and Settling the Presbyterian Church Government (Act 1690, c. 5).

Our sovereign lord and lady, the king and queen's majesties, and three Estates of Parliament, conceiving it to be their bound duty, after the great deliverance that God hath lately wrought for this Church and kingdom, in the first place to settle and secure therein the true Protestant religion, according to the truth of God's Word, as it hath of a long time been professed within this land; as also, the government of Christ's Church within this nation, agreeable to the Word of God, and most conducive to the advancement of true piety and godliness, and the establishing of peace and tranquillity within this realm; and that by an article of the Claim of Right it is declared that Prelacy, and the superiority of any office in the Church above presbyters, is, and hath been a great and insupportable grievance and trouble to this nation, and contrary to the inclination of the generality of the people ever since the Reformation, they having reformed from Popery by presbyters, and therefore ought to be abolished. Likeas, by an Act of the last session of this Parliament, Prelacy is abolished: Therefore their majesties, with advice and consent of the saids three Estates, do hereby revive, ratifie, and perpetually confirm, all laws, statutes, and Acts of Parliament made against Popery and Papists, and for the maintenance and preservation of the true Reformed Protestant religion, and for the true Church of Christ within this kingdom, in so far as they confirm the same, or are made in favours thereof. Likeas, they by these presents ratifie and establish the Confession of Faith, now read in their presence, and voted and approven by them, as the public and avowed Confession of this Church, containing the sum and substance of the doctrine of the Reformed Churches (which Confession of Faith is subjoyned to this present Act). As also they do establish, ratifie, and confirm the Presbyterian Church government and discipline—that is to say, the government of the Church by kirk-sessions, presbyteries, provincial synods, and general assemblies, ratified and established by the 114 Act, Ja. 6, parl. 12, *anno* 1592, entituled, Ratification of the Liberty of the true Kirk, &c., and thereafter received by the general consent of this nation to be the only government of Christ's Church within this kingdom: Reviving, renewing, and confirming the foresaid Act of Parliament in the whole heads thereof, except that part of it relating to patronages, which is hereafter to be taken into consideration: And rescinding, annulling, and making

void the Acts of Parliament following—viz. : Act anent restitution of bishops, Ja. 6, parl. 18, cap. 2. Act ratifying the Acts of Assembly 1610, Ja. 6, parl. 21, cap. 1. Act anent the election of archbishops and bishops, Ja. 6, parl. 22, cap. 1. Act entituled, Ratification of the Five Articles of the General Assembly at Perth, Ja. 6, parl. 23, cap. 1. Act entituled, For the restitution and re-establishment of the ancient government of the Church, by archbishops and bishops, ch. 2, parl. 2, sess. 2. Act 1, Anent the constitution of a national synod, ch. 2, parl. 1, sess. 3. Act 5, Act against such as refuse to depone against delinquents, ch. 2, parl. 2, sess. 2. Act 2, Act entituled, Act acknowledging and asserting the right of succession to the imperial crown of Scotland, ch. 2, parl. 3. Act 2, Act entituled, Act anent religion and the test, ch. 2, parl. 3, act 6, with all other acts, laws, statutes, ordinances, and proclamations, and that in so far allanerly as the saids acts and others generally and particularly above-mentioned, are contrary or prejudicial to, inconsistent with or derogatory from, the Protestant religion and Presbyterian government now established ; and allowing and declaring, that the Church government be established in the hands of and exercised by these Presbyterian ministers, who were outed since the 1st of January 1661, for nonconformity to Prelacy, or not complying with the courses of the times, and are now restored by the late Act of Parliament, and such ministers and elders only as they have admitted or received, or shall hereafter admit or receive : And also that all the said Presbyterian ministers have, and shall have right to the maintenance, rights, and other privileges by law provided to the ministers of Christ's Church within this kingdom, as they are or shall be legally admitted to particular churches. Likeas, in pursuance of the premisses, their majesties do hereby appoint the first meeting of the General Assembly of this Church, as above established, to be at Edinburgh, the third Thursday of October next to come, in this instant year 1690 ; and because many conform ministers either have deserted, or were removed from preaching in their churches preceding the 13th day of April 1689 ; and others were deprived for not giving obedience to the Act of the Estates made in the said 13th of April 1689, entituled, Proclamation against the owning of the late King James, and appointing public prayers for King William and Queen Mary : Therefore their majesties, with advice and consent foresaid, do hereby declare all the churches, either deserted, or from which the conform ministers were removed, or deprived, as said is, to be vacant, and that the Presbyterian ministers exercising their ministry within any of these paroches (or where the last incumbent is dead), by the desire or consent of the paroch, shall continue their possession, and have right to the benefices and stipends, according to their entry in the year 1689, and in time coming, ay and while the Church as now

established take further course therewith. And to the effect the disorders that have happened in this Church may be redressed, their majesties, with advice and consent foresaid, do hereby allow the general meeting, and representatives of the foresaid Presbyterian ministers and elders, in whose hands the exercise of the Church government is established, either by themselves, or by such ministers and elders as shall be appointed and authorised visitors by them, according to the custom and practice of Presbyterian government throughout the whole kingdom, and several parts thereof, to try and purge out all insufficient, negligent, scandalous, and erroneous ministers, by due course of ecclesiastical process and censures ; and likeways for redressing all other Church disorders. And further, it is hereby provided that whatsoever minister being convened before the said general meeting, and representatives of the Presbyterian ministers and elders, or the visitors to be appointed by them, shall either prove contumacious in not appearing or be found guilty, and shall be therefore censured, whether by suspension or deposition, they shall *ipso facto* be suspended from, or deprived of, their stipends and benefices.

(*Follows the foresaid Confession of Faith.*)

2. Act for Settling the Quiet and Peace of the Church (Act 1693, c. 22).

Our sovereign lord and lady, the king and queen's majesties, with advice and consent of the Estates of Parliament, ratifie, approve, and perpetually confirm the fifth Act of the second session of this current Parliament, intituled, Act ratifying the Confession of Faith, and settling Presbyterian Church government, in the whole heads, articles, and clauses thereof ; and do further statute and ordain, that no person be admitted or continued for hereafter to be a minister or preacher within this Church, unless that he, having first taken and subscribed the oath of alledgiance, and subscribed the assurance in manner appointed by another Act of this present session of Parliament made thereanent, do also subscribe the Confession of Faith, ratified in the foresaid fifth Act of the second session of this Parliament, declaring the same to be the confession of his faith, and that he ownes the doctrine therein contained to be the true doctrine which he will constantly adhere to ; as likewise, that he ownes and acknowledges Presbyterian Church government, as settled by the foresaid fifth Act of the second session of this Parliament, to be the only government of this Church, and that he will submit thereto, and concur therewith, and never endeavour, directly or indirectly, the prejudice or subversion

thereof. And their majesties, with advice and consent foresaid, statute and ordain that uniformity of worship, and of the administration of all public ordinances within this Church be observed by all the saids ministers and preachers, as the samen are at present performed and allowed therein, or shall be hereafter declared by the authority of the same, and that no minister or preacher be admitted or continued for hereafter; unless that he subscribe to observe, and do actually observe, the foresaid uniformity: And for the more effectual settling the quiet and peace of this Church, the Estates of Parliament do hereby make a humble address to their majesties, that they would be pleased to call a General Assembly, for the ordering the affairs of the Church, and to the end that all the present ministers possessing churches, not yet admitted to the exercise of the foresaid Church government, conform to the said Act, and who shall qualifie themselves in manner foresaid, and shall apply to the said Assembly, or the other Church judicatures competent, in an orderly way, each man for himself, be received to partake with them in the government thereof: Certifying such as shall not qualifie themselves, and apply to the said Assembly, or other judicatures, within the space of thirty days after meeting of the said first Assembly, in manner foresaid, that they may be deposed by the sentence of the said Assembly and other judicatures *tam ab officio quam a beneficio;* and withal declaring, that if any of the saids ministers who have not been hitherto received into the government of the Church, shall offer to qualifie themselves, and to apply in manner foresaid, they shall have their majesties' full protection, ay and while they shall be admitted and received in manner foresaid; providing always that this Act, and the benefit thereof, shall noways be extended to such of the said ministers as are scandalous, erronious, negligent, or insufficient, and against whom the same shall be verified, within the space of thirty days after the said application; but these and all others in like manner guilty, are hereby declared to be lyable and subject to the power and censure of the Church as accords: And to the effect, that the representation of this Church, in its General Assemblies, may be the more equal in all time coming, recommends it to the first Assembly that shall be called, to appoint ministers to be sent as commissioners from every presbytery, not in equal numbers, which is manifestly unequal where presbyteries are so but in a due proportion to the churches and parochins within every presbytery, as they shall judge convenient; and it is hereby declared, that all school-masters, and teachers of youth in schools, are, and shall be lyable to the tryal, judgment, and censure of the presbyteries of the bounds, for their sufficiency, qualifications, and deportment in the said office. And lastly, their majesties, with advice and consent foresaid, do hereby statute and ordain that the lords of their majesties' Privy Council, and

all other magistrats, judges, and officers of justice, give all due assistance for making the sentences and censures of the Church and judicatures thereof to be obeyed, or otherways effectual as accords.

I.

ACT OF SECURITY.

Act for Securing the Protestant Religion and Presbyterian Church Government (as incorporated into the Act Ratifying and Approving the Treaty of Union, of date 16th January 1707).

Our sovereign lady and the Estates of Parliament considering that, by the late Act of Parliament for a treaty with England for an union of both kingdoms, it is provided that the commissioners for that treaty should not treat of or concerning any alteration of the worship, discipline, and government of the Church of this kingdom, as now by law established ; which treaty being now reported to the Parliament, and it being reasonable and necessary that the true Protestant religion, as presently professed within this kingdom, with the worship, discipline, and government of this Church, should be effectually and unalterably secured ; therefore her majesty, with advice and consent of the said Estates of Parliament, does hereby establish and confirm the said true Protestant religion, and the worship, discipline, and government of this Church, to continue without any alteration to the people of this land in all succeeding generations ; and more especially, her majesty, with advice and consent foresaid, ratifies, approves, and for ever confirms the fifth Act of the first Parliament of King William and Queen Mary, intituled, Act Ratifying the Confession of Faith and Settling Presbyterian Church Government, with the haill other Acts of Parliament relating thereto, in prosecution of the declaration of the Estates of this kingdom, containing the Claim of Right, bearing date the eleventh of April one thousand six hundred and eighty-nine ; and her majesty, with advice and consent foresaid, expressly provides and declares that the foresaid true Protestant religion contained in the above-mentioned Confession of Faith, with the form and purity of worship presently in use within this Church, and its Presbyterian Church government and discipline—that is to say, the government of the Church by kirk-sessions, presbyteries, provincial synods, and general assemblies, all established by the foresaid Acts of Parliament, pursuant to the Claim of Right—shall remain and

continue unalterable ; and that the said Presbyterian government shall be the only government of the Church within the kingdom of Scotland. And further, for the greater security of the foresaid Protestant religion, and of the worship, discipline, and government of this Church, as above established, her majesty, with advice and consent foresaid, statutes and ordains that the Universities and Colleges of St Andrews, Glasgow, Aberdeen, and Edinburgh, as now established by law, shall continue within this kingdom for ever. And that, in all time coming, no professors, principals, regents, masters, or others bearing office in any university, college, or school within this kingdom, be capable, or be admitted or allowed to continue in the exercise of their said functions, but such as shall owne and acknowledge the civil government, in manner prescribed or to be prescribed by the Acts of Parliament. As also, that before or at their admissions, they do and shall acknowledge and profess, and shall subscribe to the foresaid Confession of Faith, as the confession of their faith, and that they will practise and conform themselves to the worship presently in use in this Church, and submit themselves to the government and discipline thereof, and never endeavour, directly or indirectly, the prejudice or subversion of the same ; and that before the respective presbyteries of their bounds, by whatsoever gift, presentation, or provision they may be thereto provided. And further, her majesty, with advice foresaid, expresly declares and statutes that none of the subjects of this kingdom shall be lyable to, but all and every one of them for ever free of any oath, test, or subscription within this kingdom, contrary to, or inconsistent with the foresaid true Protestant religion and Presbyterian Church government, worship, and discipline, as above established ; and that the same, within the bounds of this Church and kingdom, shall never be imposed upon or required of them in any sort. And lastly, that after the decease of her present majesty (whom God long preserve), the sovereign succeeding to her in the royal government of the kingdom of Great Britain shall, in all time coming, at his or her accession to the crown, swear and subscribe that they shall inviolably maintain and preserve the foresaid settlement of the true Protestant religion, with the government, worship, discipline, right, and privileges of this Church, as above established by the laws of this kingdom, in prosecution of the Claim of Right. And it is hereby statute and ordained, that this Act of Parliament, with the establishment therein contained, shall be held and observed in all time coming, as a fundamental and essential condition of any treaty or union to be concluded betwixt the two kingdoms, without any alteration thereof, or derogation thereto, in any sort for ever. As also, that this Act of Parliament, and settlement therein contained, shall be insert and repeated in any Act of Parliament that shall pass, for

agreeing and concluding the foresaid treaty or union betwixt the two kingdoms; and that the same shall be therein expresly declared to be a fundamental and essential condition of the said treaty or union, in all time coming. Which Articles of Union, and Act immediately above-written, her majesty, with advice and consent foresaid, statutes, enacts, and ordains to be, and continue in all time coming, the sure and perpetual foundation of an compleat and intire union of the two kingdoms of Scotland and England, under this express condition and provision, that the approbation and ratification of the foresaid Articles and Act shall be noways binding on this kingdom, until the said Articles and Act be ratified, approven, and confirmed by her majesty, with and by the authority of the Parliament of England, as they are now agreed to, approven, and confirmed by her majesty, with and by the authority of the Parliament of Scotland. Declaring, nevertheless, that the Parliament of England may provide for the security of the Church of England as they think expedient, to take place within the bounds of the said kingdom of England, and not derogating from the security above provided for establishing of the Church of Scotland within the bounds of this kingdom. As also, the said Parliament of England may extend the additions and other provisions contained in the Articles of Union, as above insert in favours of the subjects of Scotland, to and in favours of the subjects of England, which shall not suspend or derogat from the force and effect of this present ratification, but shall be understood as herein included, without the necessity of any new ratification in the Parliament of Scotland. And lastly, her majesty enacts and declares, that all laws and statutes in this kingdom, so far as they are contrary to or inconsistent with the terms of these Articles as above mentioned, shall from and after the union cease and become void.

K.

THE CLAIM OF RIGHT OF 1842, AND PROTEST OF 1843.

1. Claim, Declaration, and Protest by the General Assembly of the Church of Scotland of 1842, anent the Encroachments of the Court of Session.

[The Claim begins with an argument that an original and exclusive jurisdiction of the Church *quoad spiritualia*, "founded on God's Word, and set forth in the Confession of Faith and other standards of this

Church," has been recognised and ratified, on the part of the State, by many statutes and on many occasions therein enumerated, especially at the Revolution and the Union ; and, after a reference to the fundamental principle of non-intrusion, it then proceeds :—]

And whereas, by a judgment pronounced by the House of Lords, in 1839,[1] it was, for the first time, declared to be illegal to refuse to take on trial, and to reject the presentee of a patron (although a layman, and merely a candidate for admission to the office of the ministry), in consideration of this fundamental principle of the Church, and in respect of the dissent of the congregation ; to the authority of which judgment, so far as disposing of civil interests, this Church implicitly bowed, by at once abandoning all claim to the *jus devolutum*,—to the benefice, for any pastor to be settled by her,—and to all other civil right or privilege which might otherwise have been competent to the Church or her courts ; and anxiously desirous, at the same time, of avoiding collision with the civil courts, she so far suspended the operation of the above-mentioned Act of Assembly, as to direct all cases, in which dissents should be lodged by a majority of the congregation, to be reported to the General Assembly, in the hope that a way might be opened up to her for reconciling with the civil rights declared by the House of Lords, adherence to the above-mentioned fundamental principle, which she could not violate or abandon, by admitting to the holy office of the ministry a party not having, in her conscientious judgment, a legitimate call thereto, or by intruding a pastor on a reclaiming congregation contrary to their will ; and farther, addressed herself to the Government and the Legislature for such an alteration of the law (as for the first time now interpreted), touching the temporalities belonging to the Church (which alone she held the decision of the House of Lords to be capable of affecting or regulating), as might prevent a separation between the cure of souls and the benefice thereto attached :

. . . . . .

And whereas, pending the efforts of the Church to accomplish the desired alteration of the law, the Court of Session,—a tribunal instituted by special Act of Parliament for the specific and limited purpose of "doing and administration of justice in all *civil actions*" (1537, c. 36), with judges appointed simply "to sit and decide upon all *actions civil*" (1532, c. 1),—not confining themselves to the determination of "civil actions,"—to the withholding of civil consequences from sentences of the Church courts, which, in their judgment, were not warranted by the statutes recognising the jurisdiction of these courts, —to the enforcing of the provision of the Act 1592, c. 117, for re-

[1] Auchterarder case, 1839.

tention of the fruits of the benefice in case of wrongful refusal to admit a presentee, or the giving of other civil redress for any civil injury held by them to have been wrongfully sustained in consequence thereof,—have, in numerous and repeated instances, stepped beyond the province allotted to them by the Constitution, and within which alone their decisions can be held to declare the law, or to have the force of law, deciding not only "actions civil," but "causes spiritual and ecclesiastical,"—and that, too, even where these had no connection with the exercise of the right of patronage,—and have invaded the jurisdiction, and encroached upon the spiritual privileges of the courts of this Church, in violation of the Constitution of the country—in defiance of the statutes above mentioned, and in contempt of the laws of this kingdom : as for instance—

By interdicting presbyteries of the Church from admitting to a pastoral charge,[1] when about to be done irrespective of the civil benefice attached thereto, or even where there was no benefice—no right of patronage—no stipend—no manse or glebe, and no place of worship, or any patrimonial right, connected therewith.[2]

By issuing a decree,[3] requiring and ordaining a Church court to take on trial and admit to the office of the holy ministry, in a particular charge, a probationer or unordained candidate for the ministry, and to intrude him also on the congregation, contrary to the will of the people ;—both in this, and in the cases first mentioned, invading the Church's exclusive jurisdiction in the admission of ministers, the preaching of the Word, and administration of sacraments—recognised by statute to have been "given by God" directly to the Church, and to be beyond the limits of the secular jurisdiction.

By prohibiting the communicants[4] of the Church from intimating their dissent from a call proposed to be given to a candidate for the ministry to become their pastor.

By granting interdict against the establishment of additional ministers to meet the wants of an increasing population,[5] as uninterruptedly practised from the Reformation to this day : against constituting a new kirk-session in a parish, to exercise discipline ; and against innovating on its existing state, "as regards pastoral superintendence, its kirk-session, and jurisdiction and discipline thereto belonging."

By interdicting the preaching of the Gospel, and administration o ordinances,[6] throughout a whole district, by any minister of the Church under authority of the Church courts ; thus assuming to themselves the regulation of the "preaching of the Word" and "administration of the sacraments," and at the same time invading the privilege, common

[1] First Lethendy case.
[2] Stewarton case.
[3] Marnoch case.
[4] Daviot case.
[5] Stewarton case.
[6] Strathbogie cases.

to all the subjects of the realm, of having freedom to worship God according to their consciences, and under the guidance of the ministers of the communion to which they belong.

By holding the members of inferior Church judicatories liable in damages [1] for refusing to break their ordination vows and oaths (sworn by them, in compliance with the requirements of the statutes of the realm, and, in particular, of the Act of Security embodied in the Treaty of Union), by disobeying and setting at defiance the sentences, in matters spiritual and ecclesiastical, of their superior Church judicatories, to which, by the constitution of the Church and country, they are, in such matters, subordinate and subject, and which, by their said vows and oaths, they stand pledged to obey.

By interdicting the execution of the sentence of a Church judicatory, prohibiting a minister from preaching or administering ordinances within a particular parish,[2] pending the discussion of a cause in the Church courts as to the validity of his settlement therein.

By interdicting the General Assembly and inferior Church judicatories from inflicting Church censures; as in one case, where interdict was granted against the pronouncing of sentence of deposition upon a minister found guilty of theft, by a judgment acquiesced in by himself;[3] in another, where a presbytery was interdicted from proceeding in the trial of a minister accused of fraud and swindling;[4] and in a third, where a presbytery was interdicted from proceeding with a libel against a licentiate for drunkenness, obscenity, and profane swearing.[5]

By suspending Church censures,[6] inflicted by the Church judicatories in the exercise of discipline (which, by special statute, all "judges and officers of justice" are ordered "to give due assistance" for making "to be obeyed, or otherwise effectual"), and so reponing ministers suspended from their office, to the power of preaching and administering ordinances; thus assuming to themselves the "power of the keys."

By interdicting the execution of a sentence of deposition from the office of the holy ministry, pronounced by the General Assembly of the Church;[7] thereby also usurping the "power of the keys," and supporting deposed ministers in the exercise of ministerial functions; which is declared by special statute to be a "high contempt of the authority of the Church, and of the laws of the kingdom establishing the same."

By assuming to judge of the right of individuals elected members of the General Assembly to sit therein,[8] and interdicting them from taking their seats; thus interfering with the constitution of the

[1] Second Auchterarder case.
[2] Culsalmond case.
[3] Cambusnethan case.
[4] Stranraer case.
[5] Fourth Lethendy case.
[6] First and second Strathbogie cases.
[7] Third Strathbogie case.
[8] Fifth Strathbogie case.

supreme court of the Church, and violating her freedom in the holding of General Assemblies, secured to her by statute.

By, in the greater number of instances above referred to, requiring the inferior judicatories of the Church to disobey the sentences, in matters spiritual and ecclesiastical, of the superior judicatories, to which, by the constitution in Church and State, they are subordinate and subject, and which, in compliance with the provisions of the statutes of the realm, their members have solemnly sworn to obey ;—thus subverting "the government of the Church by kirk-sessions, presbyteries, provincial synods, and general assemblies," settled by statute and the Treaty of Union, as "the only government of the Church within the kingdom of Scotland."

By all which acts, the said Court of Session, apparently not adverting to the oath taken by the sovereign, from which they hold their commissions, have exercised powers not conferred upon them by the Constitution, but by it excluded from the province of any secular tribunal,—have invaded the jurisdiction of the courts of the Church,—have subverted its government,—have illegally attempted to coerce Church courts in the exercise of their purely spiritual functions,—have usurped the "power of the keys,"—have wrongfully acclaimed, as the subjects of their civil jurisdiction, to be regulated by their decrees, ordination of laymen to the office of the holy ministry, admission to the cure of souls, Church censures, the preaching of the Word, and the administration of the sacraments,—and have employed the means intrusted to them for enforcing submission to their lawful authority, in compelling submission to that which they have usurped,—in opposition to the doctrines of God's Word set forth in the Confession of Faith, as ratified by statute,—in violation of the Constitution,—in breach of the Treaty of Union, and in disregard of divers express enactments of the Legislature :

And whereas farther encroachments are threatened on the government and discipline of the Church as by law established,[1] in actions now depending before the said court, in which it is sought to have sentences of deposition from the office of the holy ministry reduced and set aside,[2] and minorities of inferior judicatories authorised to take on trial and admit to the office of the holy ministry, in disregard of, and in opposition to, the authority of the judicatories of which they are members, and of the superior judicatories to which they are subordinate and subject :

And whereas the government and discipline of Christ's Church cannot be carried on according to His laws and the constitution of His Church, subject to the exercise, by any secular tribunal, of such powers as have been assumed by the said Court of Session :

[1] Fourth Strathbogie case. [2] Third Auchterarder case. Third Lethendy case.

And whereas this Church, highly valuing, as she has ever done, her connection, on the terms contained in the statutes herein-before recited, with the State, and her possession of the temporal benefits thereby secured to her for the advantage of the people, must, nevertheless, even at the risk and hazard of the loss of that connection and of these public benefits—deeply as she would deplore and deprecate such a result for herself and the nation—persevere in maintaining her liberties as a Church of Christ, and in carrying on the government thereof on her own constitutional principles, and must refuse to intrude ministers on her congregations, to obey the unlawful coercion attempted to be enforced against her in the exercise of her spiritual functions and jurisdiction, or to consent that her people be deprived of their rightful liberties :

Therefore, the General Assembly, while, as above set forth, they fully recognise the absolute jurisdiction of the civil courts in relation to all matters whatsoever of a civil nature, and especially in relation to all the temporalities conferred by the State upon the Church, and the civil consequences attached by law to the decisions, in matters spiritual, of the Church courts,—do, in name and on behalf of this Church, and of the nation and people of Scotland, and under the sanction of the several statutes, and the Treaty of Union herein-before recited, claim, as of right, that she shall freely possess and enjoy her liberties, government, discipline, rights, and privileges, according to law, especially for the defence of the spiritual liberties of her people, and that she shall be protected therein from the foresaid unconstitutional and illegal encroachments of the said Court of Session, and her people secured in their Christian and constitutional rights and liberties.

And they declare, that they cannot, in accordance with the Word of God, the authorised and ratified standards of this Church, and the dictates of their consciences, intrude ministers on reclaiming congregations, or carry on the government of Christ's Church, subject to the coercion attempted by the Court of Session as above set forth ; and that, at the risk and hazard of suffering the loss of the secular benefits conferred by the State, and the public advantages of an establishment, they must, as by God's grace they will, refuse so to do : for, highly as they estimate these, they cannot put them in competition with the inalienable liberties of a Church of Christ, which, alike by their duty and allegiance to their Head and King, and by their ordination vows, they are bound to maintain, "notwithstanding of whatsoever trouble or persecution may arise."

And they protest, that all and whatsoever Acts of the Parliament of Great Britain, passed without the consent of this Church and nation, in alteration of or derogation to the aforesaid government, discipline, right, and privileges of this Church (which were not allowed to be

treated of by the commissioners for settling the terms of the union between the two kingdoms, but were secured by antecedent stipulation, provided to be inserted, and inserted in the Treaty of Union, as an unalterable and fundamental condition thereof, and so reserved from the cognisance and power of the federal Legislature created by the said treaty), as also, all and whatsoever sentences of courts in contravention of the same government, discipline, right, and privileges, are, and shall be, in themselves void and null, and of no legal force or effect; and that, while they will accord full submission to all such acts and sentences, in so far—though in so far only—as these may regard civil rights and privileges, whatever may be their opinion of the justice or legality of the same, their said submission shall not be deemed an acquiescence therein, but that it shall be free to the members of this Church, or their successors, at any time hereafter, when there shall be a prospect of obtaining justice, to claim the restitution of all such civil rights and privileges, and temporal benefits and endowments, as for the present they may be compelled to yield up, in order to preserve to their office-bearers the free exercise of their spiritual government and discipline, and to their people the liberties, of which respectively it has been attempted, so contrary to law and justice, to deprive them.

And, finally, the General Assembly call the Christian people of this kingdom, and all the Churches of the Reformation throughout the world, who hold the great doctrine of the sole Headship of the Lord Jesus over His Church, to witness, that it is for their adherence to that doctrine, as set forth in their Confession of Faith, and ratified by the laws of this kingdom, and for the maintenance by them of the jurisdiction of the office-bearers, and the freedom and privileges of the members of the Church from that doctrine flowing, that this Church is subjected to hardship, and that the rights so sacredly pledged and secured to her are put in peril; and they especially invite all the office-bearers and members of this Church, who are willing to suffer for their allegiance to their adorable King and Head, to stand by the Church, and by each other, in defence of the doctrine aforesaid, and of the liberties and privileges, whether of office-bearers or people, which rest upon it; and to unite in supplication to Almighty God, that He would be pleased to turn the hearts of the rulers of this kingdom, to keep unbroken the faith pledged to this Church, in former days, by statutes and solemn treaty, and the obligations, come under to God himself, to preserve and maintain the government and discipline of this Church in accordance with His Word; or otherwise, that He would give strength to this Church—office-bearers and people—to endure resignedly the loss of the temporal benefits of an Establishment, and the personal sufferings and sacrifices to which they may be called, and would also inspire them with zeal and energy to promote

the advancement of His Son's kingdom, in whatever condition it may be His will to place them ; and that, in His own good time, He would restore to them these benefits, the fruits of the struggles and sufferings of their fathers in times past in the same cause ; and, thereafter, give them grace to employ them more effectually than hitherto they have done for the manifestation of His glory.

2. Protest by Commissioners to the General Assembly appointed to meet on 18th May 1843.

At Edinburgh, and within a large hall at Canonmills, the 18th day of May 1843 years. Sess. 1.

The Commissioners to the General Assembly of the Church of Scotland, appointed to have been holden this day, having met in St Andrew's Church, the ministers and elders, commissioners thereto, whose names are appended to the protest then and there made, and hereinafter inserted, having withdrawn from that place, and having convened in a large hall at Canonmills, in presence of a great concourse of ministers, elders, and people, and having duly constituted themselves in the name of the Head of the Church, and appointed the Rev. Dr Chalmers to be their moderator, the protest above mentioned was produced and read, and thereafter ordered to be recorded as follows :—

We, the undersigned ministers and elders, chosen as commissioners to the General Assembly of the Church of Scotland, indicted to meet this day, but precluded from holding the said Assembly by reason of the circumstances hereinafter set forth, in consequence of which a free Assembly of the Church of Scotland, in accordance with the laws and constitution of the said Church, cannot at this time be holden—

Considering that the Legislature, by their rejection of the Claim of Right adopted by the last General Assembly of the said Church, and their refusal to give redress and protection against the jurisdiction assumed, and the coercion of late repeatedly attempted to be exercised over the courts of the Church in matters spiritual by the civil courts, have recognised and fixed the conditions of the Church Establishment, as henceforward to subsist in Scotland, to be such as these have been pronounced and declared by the said civil courts in their several recent decisions, in regard to matters spiritual and ecclesiastical, whereby it has been held *inter alia*,—

First, That the courts of the Church by law established, and members thereof, are liable to be coerced by the civil courts in the exercise of

their spiritual functions; and in particular in the admission to the office of the holy ministry, and the constitution of the pastoral relation, and that they are subject to be compelled to intrude ministers on reclaiming congregations in opposition to the fundamental principles of the Church, and their views of the Word of God, and to the liberties of Christ's people.

Second, That the said civil courts have power to interfere with and interdict the preaching of the Gospel and administration of ordinances as authorised and enjoined by the Church courts of the Establishment.

Third, That the said civil courts have power to suspend spiritual censures pronounced by the Church courts of the Establishment against ministers and probationers of the Church, and to interdict their execution as to spiritual effects, functions, and privileges.

Fourth, That the said civil courts have power to reduce and set aside the sentences of the Church courts of the Establishment deposing ministers from the office of the holy ministry, and depriving probationers of their licence to preach the Gospel, with reference to the spiritual status, functions, and privileges of such ministers and probationers—restoring them to the spiritual office and status of which the Church courts had deprived them.

Fifth, That the said civil courts have power to determine on the right to sit as members of the supreme and other judicatories of the Church by law established, and to issue interdicts against sitting and voting therein, irrespective of the judgment and determination of the said judicatories.

Sixth, That the said civil courts have power to supersede the majority of a Church court of the Establishment, in regard to the exercise of its spiritual functions as a Church court, and to authorise the minority to exercise the said functions, in opposition to the court itself, and to the superior judicatories of the Establishment.

Seventh, That the said civil courts have power to stay processes of discipline pending before courts of the Church by law established, and to interdict such courts from proceeding therein.

Eighth, That no pastor of a congregation can be admitted into the Church courts of the Establishment, and allowed to rule, as well as to teach, agreeably to the institution of the office by the Head of the Church, nor to sit in any of the judicatories of the Church, inferior or supreme—and that no additional provision can be made for the exercise of spiritual discipline among the members of the Church, though not affecting any patrimonial interests, and no alteration introduced in the state of pastoral superintendence and spiritual discipline in any parish, without the sanction of a civil court.

All which jurisdiction and power on the part of the said civil courts severally above specified, whatever proceeding may have given occasion

to its exercise, is, in our opinion, in itself inconsistent with Christian liberty, and with the authority which the Head of the Church hath conferred on the Church alone.

And farther considering, that a General Assembly, composed, in accordance with the laws and fundamental principles of the Church, in part of commissioners themselves admitted without the sanction of the civil court, or chosen by presbyteries composed in part of members not having that sanction, cannot be constituted as an Assembly of the Establishment without disregarding the law and the legal conditions of the same as now fixed and declared ;

And farther considering, that such commissioners as aforesaid would, as members of an Assembly of the Establishment, be liable to be interdicted from exercising their functions, and to be subjected to civil coercion at the instance of any individual having interest who might apply to the civil courts for that purpose ;

And considering farther, that civil coercion has already been in divers instances applied for and used, whereby certain commissioners returned to the Assembly this day appointed to have been holden, have been interdicted from claiming their seats, and from sitting and voting therein ; and certain presbyteries have been, by interdicts directed against their members, prevented from freely choosing commissioners to the said Assembly, whereby the freedom of such Assembly, and the liberty of election thereto, has been forcibly obstructed and taken away ;

And farther considering, that, in these circumstances, a free Assembly of the Church of Scotland, by law established, cannot at this time be holden, and that an Assembly, in accordance with the fundamental principles of the Church, cannot be constituted in connection with the State without violating the conditions which must now, since the rejection by the Legislature of the Church's Claim of Right, be held to be the conditions of the Establishment ;

And considering that, while heretofore, as members of Church judicatories ratified by law and recognised by the Constitution of the kingdom, we held ourselves entitled and bound to exercise and maintain the jurisdiction vested in these judicatories with the sanction of the Constitution, notwithstanding the decrees as to matters spiritual and ecclesiastical of the civil courts, because we could not see that the State had required submission thereto as a condition of the Establishment, but, on the contrary, were satisfied that the State, by the Acts of the Parliament of Scotland, for ever and unalterably secured to this nation by the Treaty of Union, had repudiated any power in the civil courts to pronounce such decrees, we are now constrained to acknowledge it to be the mind and will of the State, as recently declared, that such submission should and does form a condition of the

Establishment, and of the possession of the benefits thereof; and that as we cannot, without committing what we believe to be sin—in opposition to God's law—in disregard of the honour and authority of Christ's crown, and in violation of our own solemn vows,—comply with this condition, we cannot in conscience continue connected with it, and retain the benefits of an Establishment to which such condition is attached.

We, therefore, the ministers and elders foresaid, on this the first occasion, since the rejection by the Legislature of the Church's Claim of Right, when the commissioners chosen from throughout the bounds of the Church to the General Assembly appointed to have been this day holden are convened together, do protest, that the conditions foresaid, while we deem them contrary to and subversive of the settlement of church government effected at the Revolution, and solemnly guaranteed by the Act of Security and Treaty of Union, are also at variance with God's Word, in opposition to the doctrines and fundamental principles of the Church of Scotland, inconsistent with the freedom essential to the right constitution of a Church of Christ, and incompatible with the government which He, as the Head of His Church, hath therein appointed distinct from the civil magistrate.

And we farther protest, that any Assembly constituted in submission to the conditions now declared to be law, and under the civil coercion which has been brought to bear on the election of commissioners to the Assembly this day appointed to have been holden, and on the commissioners chosen thereto, is not, and shall not be deemed, a lawful and free Assembly of the Church of Scotland, according to the original and fundamental principles thereof; and that the Claim, Declaration, and Protest of the General Assembly which convened at Edinburgh in May 1842, as the act of a free and lawful Assembly of said Church, shall be holden as setting forth the true constitution of the said Church; and that the said Claim, along with the laws of the Church now subsisting, shall in nowise be affected by whatsoever acts and proceedings of any Assembly constituted under the conditions now declared to be the law, and in submission to the coercion now imposed on the Establishment.

And, finally, while firmly asserting the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word, and reserving to ourselves and our successors to strive by all lawful means, as opportunity shall in God's good providence be offered, to secure the performance of this duty agreeably to the Scriptures, and in implement of the statutes of the kingdom of Scotland, and the obligations of the Treaty of Union as understood by us and our ancestors, but acknowledging that we do not hold ourselves at liberty to retain the benefits of the Establishment

while we cannot comply with the conditions now to be deemed thereto attached—we protest, that in the circumstances in which we are placed, it is and shall be lawful for us, and such other commissioners chosen to the Assembly appointed to have been this day holden as may concur with us, to withdraw to a separate place of meeting, for the purpose of taking steps for ourselves and all who adhere to us—maintaining with us the Confession of Faith and standards of the Church of Scotland, as heretofore understood—for separating in an orderly way from the Establishment; and thereupon adopting such measures as may be competent to us, in humble dependence on God's grace and the aid of the Holy Spirit, for the advancement of His glory, the extension of the Gospel of our Lord and Saviour, and the administration of the affairs of Christ's house, according to His Holy Word; and we do now, for the purpose foresaid, withdraw accordingly, humbly and solemnly acknowledging the hand of the Lord in the things which have come upon us, because of our manifold sins, and the sins of this Church and nation; but, at the same time, with an assured conviction, that we are not responsible for any consequences that may follow from this our enforced separation from an Establishment which we loved and prized—through interference with conscience, the dishonour done to Christ's crown, and the rejection of His sole and supreme authority as King in His Church.

L.

DEBATE IN GENERAL ASSEMBLY OF 1901 ON "THE WHOLE POWERS OF THE CHURCH WITH REGARD TO THE CONFESSION."

Dr Story, in presenting the report, with his own and another dissent, said:—

It was the intention of the Legislature which created the tie between Church and State that three things should be secured, in securing which they had the co-operation of the Church. These three things were: (1) The Protestant religion; (2) pure worship; (3) Presbyterian government. It was with the view of securing these that the State passed the Acts it did pass regarding the Confession of Faith, and it had to a very large extent succeeded in securing these three objects. The Protestant religion, in the broad sense in which it was understood, was secured in this country as perhaps in no other; purity of worship, however extravagant some language might have

been in regard to slight changes and improvements in the worship of the Church, was maintained with equal certainty; and the government of the Church had always been, since the Reformation, Presbyterian, and was likely to remain so, he thought, until the end of time. There were certain drifts of inclination or tendency in the Church towards assimilation to other forms of government, but these were essentially movements on the surface. The heart of the Church was sound. It was attached to its Presbyterian government, and it would not exchange it for any other. But when he said that these things had been secured, they had been secured at the expense of some rigour in the terms in which the compact between Church and State had been defined. Yet even dealing with questions of doctrine, which the Church considered, and rightly considered, more important than anything else, that which was to be looked upon as any infraction of the purity laid down by the State, and accepted by the Church, was explained in terms very broad and liberal. They were told that the publishing of such opinions or maintaining such practices as were contrary, not, it was to be observed, to the Confession, but "to the light of nature or to the known principles of Christianity," or generally which were "destructive to the general peace and order which Christ hath established in the Church," were to be the subjects of censure by the Church, and by the power of the civil magistrate. These were very liberal terms in which to explain the securities which it was thought necessary to take in the days to which he referred. They left to the Church a very great freedom in dealing with questions that were in its own spiritual province, and upon which it might wish to differ from the rigid letter of the law laid down two hundred years ago. But Dr Mair and others of the committee, who took a different view and adhered to a different conclusion, admitted this in a sense very different from that in which he (Dr Story) was inclined to admit it. As he understood their arguments, they recognised that the only power which the Church had in dealing with questions which were concerned with diverging from the lines laid down by the Confession of Faith was a disciplinary power; it had no interpretative power. It could only deal with such questions in the course of discipline. It was only if a man was libelled and brought before the Church courts for violating the terms of the Confession that the Church could express any opinion whether those terms were violated or not, or whether they were to be interpreted leniently. They must, in fact, have a culprit before the bar of the Assembly, and a definition given by the Assembly of the sense in which it interpreted its own formulas. The libelling of a minister was the only avenue of enlarging, improving, or modernising the views of the Church which they found in the Confession. That was to say, for example, if any

one were to be libelled—as he might be libelled in some northern presbytery—for avowing the opinion that the Pope was not "the man of sin and son of perdition" (that was one of the doctrines of the Confession of Faith), the only opportunity the Church would have of expressing a gentler opinion with regard to the Head of the Roman Catholic Church would be having the man libelled, the libel held not proven, and the man acquitted. In regard to the doctrine of the Sabbath, and in the same way with much more serious questions, the question of Particular Election and of a Limited Atonement, which were both doctrines of the Confession of Faith, if a man was libelled for preaching that these were not true doctrines of the Church —as he believed hundreds of ministers in the Church of Scotland did every Sunday—the only way in which the General Assembly could express the slightest opinion would be having the man libelled at the bar. Any advance in the opinion of the Church from the extreme Calvinism of the seventeenth century would be reached through the avenue—an avenue which he (Dr Story) thought a most questionable avenue—of libelling a brother minister. If his friends in the Committee, to whom he referred, held that that was so, and that the only means which the Church had of announcing a new opinion, or vindicating an enlarged one, was libelling someone and acquitting him, they were going far beyond what was laid down in the Confession of Faith itself, and what was the obvious meaning and intention of the Confession. The Confession affirmed that the Word was to be the one ultimate appeal in all questions. That was not an accidental thing in the Confession. It was bound up in its articles, and the idea of its being confirmed and ratified by Act of Parliament was inconsistent with the idea of Protestant freedom and of the Reformed religion, and with the idea of a Church which was living and progressing and thinking, in the faith of the fulfilment of its great Master's promise—"My spirit will guide you into all truth"—not into the doctrine of the Confession of Faith, and stopping there; not into this dogma or that, but "into all truth," which the spirit of man seeking earnestly for divine guidance and open to divine influence was capable of receiving. Whatever opinion might now be held as to the Church's spiritual liberty in this regard, it was evident that two hundred years ago the Church believed in its right to revise its forms, and that it did not regard its doing so as in any way endangering the Protestant religion and the Reformed worship and government, which it existed to defend. It regarded its doing so as an expression of the intelligence of the Church, finding, as all living intelligence must find, new truths in the Word, and new light and meaning in these truths. What was called the Barrier Act, against innovations, brought forward in the Assembly of 1695, enacted that no new Act relative to

the doctrine, worship, or government of the Church be made until it had first been transmitted to the several presbyteries of the National Church. A subsequent Act, two years later, indicated that the Assembly should be very deliberate in making any change, and a further Act was brought forward to prevent any "sudden" alteration of innovation or other prejudice to the Church in either doctrine or worship or discipline or government. But there was no necessity to leap downstairs six steps at a time, if you had the power of walking down cautiously and quietly. These Barrier Acts showed that the Church considered it had perfect power to make such change within itself. That was the very thing and circumstance attending the limitation of them. It was a doctrine of the Confession of Faith pointing in the same direction — "all synods or councils since the apostles' times, whether general or particular, may err, and many have erred; therefore they are not to be made the rule of faith or practice, but to be used as a help in both." The Westminster Assembly was such a council, and its decisions were to be taken merely as a help to the right interpretation of the Word, not as themselves infallibly interpreting the Word, and laying down an interpretation or application which was never to be moved. No Act of Parliament could alter the plain meaning of the Confession as to the inherent rights of the Church in this and other matters of its own spiritual independence. They could not alter the formula which was embodied in the Act of Parliament. He believed, and he was sorry to say it, that the formula could not be altered. But the Church, that Assembly as the highest court of the Church, as a court of discipline, as a court of authoritative interpretation, was invested with the freedom which it might exercise according to the law, and which was only qualified by the Church's loyalty to the Protestant religion and the Reformed worship and to Presbyterian government; and it was because he believed that to be really true regarding the connection in this matter between Church and State that he proposed the following motion: "That the document bearing to be the report of the Committee, but which was adopted only by five members of the Committee, be not adopted by the Assembly. That the document called 'First Dissent' be not adopted by the Assembly. That the document called 'Second Dissent' be adopted by the Assembly as containing the answer to the remit from last Assembly."

Sheriff Vary Campbell seconded the motion. The question, he said, was whether or not the Assembly was to go into that matter. It resolved in the last Assembly to do so, having passed an overture remitting to an enlarged Committee to consider the whole powers of the Church with regard to the Confession of Faith. Had anything occurred to prevent the Assembly from proceeding to adopt a full

report on the subject? There was no ground for getting afraid, or for shelving the question or preventing inquiry. It was an attempt to look into the title-deeds of the Church, and to report what was there. They should come to some understanding as to their legal and constitutional position in regard to the Confession. It had been discovered in the process of inquiry that there was a most remarkable terror at the mere mention of such a term as "Spiritual Independence," or as Dr Mitchell called it, autonomy, or at a declaration that the General Assembly had the power of any Councils of the Christian Church. They would find that carefully avoided in the leading report of Dr Mair and his four supporters, as if there were something wrong or something to be afraid of. A second thing that had been discovered was that, when people spoke of the Confession, they seemed to make up their minds to speak of one part of it only—that which dealt with the system of doctrine founded on the Divine Sovereignty. The question came to be—Was the Church of Scotland fettered and tied hand and foot to the particular forms and expressions of the seventeenth century?—which was the affirmation of Dr Mair and his supporters; or had it constitutional powers which enabled it as a Reformed Protestant Church to meet all controversies of faith as they arose, and to enact rules with regard to them?—which was the proposition they made; and they left it to the Church to decide for them. In 1647 the General Assembly which received the Confession by no means accepted the Confession without qualifications. It said it was an excellent Confession, agreeable to the Word of God, but they objected to it in various particulars, one of which was that they objected to the doctrine of the Confession in so far as it is said that there could be no Assemblies of the Church unless they were called by the civil magistrate. That was a doctrine their predecessors in 1647 said they would never adopt, and it had never been adopted by the Church. The terms of the Barrier Act showed that it was an inherent power of the Assembly as a council of the Church to determine controversies of faith. It was only in modern times that a mistake had been made in confining the meaning of the Confession to one part of it, namely, that dealing with the doctrine of the Sovereignty and the Covenant Theology. It was not necessary to be a theologian in order to read a statutory document. What they should do was to read the plain meaning of the Confession in the light of the Acts of 1592, chap. 116, and of 1690, chap. 5, the latter of which declared that the Confession of Faith was the public and avowed Confession of the Church of Scotland. But taking the Confession apart from the statutes, it fell, not into one portion, but into three portions. First of all, there was a careful statement of the doctrine of the eternal decrees, the covenant theology, and the general working out systematically of the theory

of the sovereignty. Even as regarded these the Confession did not profess to be a creed, and the Westminster Assembly of Divines were careful to give the warning that differences of opinion about the Confession must be tried by an appeal to the Word. There were other parts, and one of them was that which dealt with individual liberties and individual duties. It began with that noble definition of the liberty of conscience—that "God alone is Lord of the conscience, and hath left it free from the doctrines and commandments of men." That noble phrase contained the very essence of Protestantism, and it contained what was the weakness and the glory of Protestantism—that the Protestant Church was a living, thinking Church, not tied or fettered by formulas, but expressing its spiritual life in the forms most suitable at the time. Part of the Confession dealt with religious worship, with the Sabbath Day, and with the right and duty to make oaths and vows, but showed that no man was to make a promissory oath to do anything that was forbidden in the Word of God. Still, notwithstanding that liberty and freedom, for the sake of order the maintaining of such practices as were contrary to the light of nature or to the known principles of Christianity, whether concerning faith, worship, or conversation, might be called to account. That was what the Confession itself said, but they were not to try a man because he doubted the first part of the Confession. There was a third part of the Confession which had been entirely neglected by Dr Mair and the gentlemen who made the First Dissent, and that was the government of the Church—its position and its power. The Westminster Assembly of Divines were what they should now call a Parliamentary Commission, and one of the very things it was asked to report about was the government of the Church. That was an essential part of the Confession. It was contained principally in chapters 30 and 31. The doctrine there laid down was such that the Long Parliament would not allow it to be accepted, although it was accepted by the Scots Act of 1649, repealed at the Restoration. It gave them the doctrine of the Churches which replaced the Roman Church. It said the Pope had not the headship of the Church, and that the civil magistrate, the king, had not the headship, but it referred to Christ as the only Head of the Church. But that was its first step, for it went on to say that it was an essential part of the Christian Church—an inherent part of its constitution—that there should be Councils from time to time to consider controversies of faith and cases of conscience. The Greek Church had its Synods and the Roman Church its Councils. Their Church had its General Assembly, and while the Confession left the calling of the Assembly to the civil magistrate, that was a part of the doctrine of the Confession which the Church had never adopted, and never should adopt, and the Moderator called the As-

sembly in the name of the divine Head of the Church. The doctrine they maintained was that their Assembly had the power of a Council to determine controversies of faith and cases of conscience. That was undoubtedly legislative work, and the words used were the words of the Canon Law. They were "rules and directions," "decrees and determinations," that were to be made or issued, and they would find the same phraseology in the first article of the Confession. These powers were not for priestly rule or domination, but constituted an essential and characteristic freedom, franchise, or privilege of the Scottish Church, won after long struggles, and not to be given up or minimised on any views of temporary expediency, but to be held and wisely exercised from time to time as a sacred trust for the nation. They contended that the Church had powers of Church government in matters of controversies of faith and cases of conscience, and it was upon that point that the difference had arisen between them and other members of the committee. They challenged Dr Mair to show the extent of the powers of the Church. In that connection they referred to a case which had been regarded as a cause of shame, namely, the deposition of Campbell of Row; and they wanted to know whether it was to be repeated, and if it was not to be repeated, why not? He wanted to know whether any member of the Church, who maintained in substance the views of Campbell of Row, was to be libelled, and if he were libelled, whether he was to be acquitted? Had the law changed since that terrible sentence was pronounced? If so, how were clergymen of the Church to know whether it had been changed or not, and were they to be exposed, by any fanatical prosecutor, or any presbytery silly enough to take it up, to a libel on the same charges as were made against Campbell of Row? What effect had the statutes that had been mentioned upon the Confession? They simply found these powers in the Confession, and ratified and approved of them, and gave them statutory authority. He did not like to regard the matter as a contract; it was not correct, but taking it as a contract, it was a contract between the State and the Church that the General Councils of the Church should have the powers he had mentioned. In Dr Mair's view, not an inch of the Confession could be touched, and having that view, he refused to use the powers which the Confession undoubtedly gave. The men of the seventeenth century were not such fools as to impose formulas which could not be carried out, and at this present moment the only Presbyterian Church in the world which had not looked into its Confession and made some amendment on it was the Church of Scotland. He summed up their position by stating that they asked for nothing but the powers which the Church might or might not exercise, that all these things had an important bearing on the meaning of the Formula, and that on no account

should the Report be accepted, or they would place the Church in a position which would be at once inconsistent and ridiculous.

Dr Mair moved that the Assembly receive the report of the committee, thank them for their diligence, and discharge them. With reference to Sheriff Vary Campbell's question as to whether a case like that of Mr Campbell of Row was to be repeated, he said that he was neither a prophet nor the son of a prophet, but he would answer that question by asking if they could legislate something different from the Confession of Faith? If they could do so, the matter was settled, and they need not dispute it further. But the whole question was, could they legislate? Those on the other side seemed to think that they could, but he was of a different opinion. His reason for going no further than to receive the report was not that he was in doubt about the soundness of the opinion in the report. Nor was he in doubt as to whether the General Assembly would support that opinion or not. His reason was that the Church ought not to commit itself to any legal pronouncement upon a matter like this, for the Church would not have the last word on a question which entered into the constitution of the Church. It would be the civil courts that would have the last word upon a matter like that. That had been repeatedly brought out before now. The question as to what the Church might legally do and what it might not legally do would go to the civil courts, and if the Church were found to have departed from its constitution, and if part of the Church were found to have cleaved to the constitution, they knew what the result would be. There was a similar matter in process just now. As to a great deal that Sheriff Campbell had said, Dr Mair pointed out that he had dealt largely with the matter of the doctrine of the Confession, which really did not come before the committee at all. But they had come to the conclusion that it was not within the power of the Church to make any alteration in a document which was embodied in the statutes of the realm, and which could not be touched except by those who had power over those statutes. They did not say that the Confession in relation to its authoritativeness was infallible, but that if the Church, which had already given one interpretation of Scripture in the form of the Confession of Faith, should change its mind and wish to put another interpretation on Scripture, they should do as their forefathers did, and go to the State and ask it to give effect to their desires. There could be no doubt as to the power of the Church in the exercise of its absolute jurisdiction in matters within their spiritual province, and that in all cases of alleged error in doctrine it could not be controlled by the civil courts. The Church might also, by a Declaratory Act, explain or define doctrinal points as to which the Confession was ambiguous or silent; but so long as the Act of 1690 remained in force

the Church had no power, by Declaratory Act or otherwise, to modify, abridge, or extend any article of the Confession. Referring to the Second Dissent from the committee's report which was put before them by Dr Story, as what ought to be adopted by the Assembly, he said it was a very peculiar form of dissent, and led to a very unusual amount of agreement between the dissentients and those from whom they dissented. There was an immense amount of matter with which he agreed, but there was also an immense amount of matter that did not require to be there at all. Another peculiarity of the report was that there was a tremendous amount of proving things which nobody doubted at all, and then when they thought they had proved to everybody that they were thoroughly in the right, they slipped in something of which they had no proof at all. The Church had spiritual life and growth, but had it power to substitute one interpretation of Scripture for another, one Confession of Faith for another, that other being part of the Constitution of the Church by law? They were also told that the Toleration Act of Queen Anne protected Episcopal congregations, and that lay professors in universities, as well as schoolmasters, had been relieved of the obligation to subscribe the Confession of Faith. That was true, but it was done by Act of Parliament, without which it could not have been done. What was the Protestant religion contained in the Confession as a statutory document that was to remain unalterable? To find out what was the Protestant religion as held by the Church of Scotland, the law courts would go to the Confession of Faith, and would say that that was the only expression of the Protestant religion that was known to them, and that from beginning to end it was the only legally acknowledged expression of the Protestant religion for the Church of Scotland. A witness had been called by Dr Story and Sheriff Vary Campbell in the form of the Barrier Act, in order to show that it would prevent hasty innovations in regard to the doctrine of the Church. The Barrier Act would put a most effectual barrier against doctrine which was contradictory to the Confession of Faith; but every doctrine was not in the Confession. The Barrier Act was passed to prevent sudden alterations, not in doctrine only, but in worship, discipline, and government. Why was not all that put into the report? Because the Church of Scotland sixty years ago did bring through its Barrier Act some attempts on the government of the Church, and did meddle with and change that government, and split the Church. Men of those days possessed by the same spirit that seemed to have entered into these dissentients would not suffer the Church to rest day or night till they got *ultra vires* legislation through the Barrier Act, and brought about the split which they were now all mourning. The last paragraph in their report showed that it was Spiritual Independence that had been all through in the minds

of those who dissented from them. That phrase was an old friend and an ill-fated cry. He refused to discuss it. If they began to do that, it might take them as long as it did their forefathers, and their conclusion was no encouragement to them to proceed with it. He humbly thought that those dissentients might have been warned by what came of the former cry for Spiritual Independence.

The Procurator (Sir John Cheyne, K.C.) seconded Dr Mair's motion. In the committee, he said, there had been frequent discussions and frequent drafts and reports, and it was discovered that there was the most irreconcilable divergence of opinion. If the committee were unable to arrive at anything like a unanimous conclusion, was it, he asked, right or fair to ask the House to decide for the one side or the other on what was simply and purely a legal question? No decision they could come to would be worth anything. It would simply be a declaration of the Assembly, and would not bind their successors, and, as Dr Mair had said, the ultimate resort was to a court of law. If Dr Story and his friends desired the Assembly to determine its powers in regard to the Confession of Faith, let them bring forward a Declaratory Act. Holding the position he did, the Procurator felt bound to say that, in his opinion, the view presented in the report was a strictly legal one. All the talk about liberty of conscience meant that the Assembly had power to whittle away every article in the Confession of Faith. No doubt they said they were to do it within the limits of the Protestant religion, but who was to define the Protestant religion? As he understood, the Confession of Faith embodied the Protestant religion. Principal Story admitted that the Formula binding upon them by the Act of 1693 could not be altered except by Act of Parliament. Supposing the Assembly were to alter an article of the Confession of Faith, they would have this anomalous result of the Assembly declaring that a certain article in the Confession of Faith was to be altered, while, on the other hand, every minister going into the Church would sign a Formula which said that the Confession as it stood in 1690 contained the true expression of his faith. It was said that the Confession was not a creed. In one sense that was true, but when they found that it must be signed by every minister of the Church, it was better, if they wanted it altered, to have that done by other means than the action of the Church courts alone. The wisest course the Assembly could take was simply to let this report lie on the table.

Dr Scott moved the following addendum to the deliverance of Dr Mair: "In resolving, in the meantime, to proceed no further in the matter, the General Assembly refer to their Act on Subscription of Office-bearers in the Church (xvii. 1889), in which they declared their desire, by the changes then enacted, 'to enlarge rather than curtail

any liberty heretofore enjoyed, and to relieve subscribers from unnecessary burdens as to forms of expression and matters which do not enter into the substance of the faith.' The General Assembly renew this declaration; and recognising that the complete and exclusive jurisdiction in all causes concerning the faith which is inherent in the Church of Christ has been ratified and guaranteed to the Church of Scotland by national statutes, and that the Church's ultimate authority in all such matters are the Holy Scriptures and the Holy Spirit, the General Assembly are confident that the office-bearers in the Church will so exercise its jurisdiction as not to oppress the consciences of any who, while owning the sum and substance of the doctrine of the Reformed Churches, are not certain as to some less important determinations also contained in it." Dr Scott said he supported thoroughly the report and the contentions of Dr Mair, and dissented from Sheriff Vary Campbell's conclusions, simply because they pointed to a very erroneous and unfounded theory as to the powers of the Church in regard to this statute—a doctrine which, if adopted by the General Assembly, would lead to a catastrophe as certainly as it occurred some sixty years ago. He accepted Dr Mair's report as the report of the facts of the case. They did not seem to feel what an enormous stride for liberty was taken by their reforming ancestors when, at the Reformation, they passed by all the creeds of the mediæval and patristic Church, and went right back to the apostles themselves. What they seemed to forget was the unparalleled liberty which they had under the statute. No Church in Christendom had more liberty in exercising jurisdiction in regard to the faith than the Church of Scotland. Their decisions were unchallengeable. That was the answer he gave to Sheriff Campbell in regard to what their forefathers did in the case of Mr Campbell of Row. If such a case occurred again the statutes remained unchanged, but the judges differed, and they would administer any such case in the light of their experience and in the light of increased knowledge, and their decision again would be an unchallengeable decision. Statutes were made for honest men. The law was made for the good as a protection against the evil, and if they looked at the enormous liberty which the Church of Scotland had they would be glad to remain as they were. The use of his addendum was this—they were living in a troubled and restless time. They must observe the conditions of the times, and, consistent with their former determinations on this question, they might be able to say something which might have the effect of showing what was the intention of the Church in regard to this matter.

Principal Lang (Aberdeen) seconded. He said there were many difficulties connected with this subject, and the difficulty behind all was the difficulty about the living faith of the Church and the Con-

fession, but on that they need not enlarge. Many of them felt—and he, for one, must say he felt—the ambiguity and the omissions in their venerable Standards. Many of them felt—and he must say he felt—that whilst he adhered to the content, he did not accept the form of the content always. The form was often harsh and hard, bearing the mark of the time to which it belonged. The content, he took it, was the light that God had thrown upon truth at the period within which the Confession of Faith was framed, and, that being so, he could feel, and did feel, that it was a true doctrine to which he could adhere. He was not prepared to say that there were not aspects of the Church not found in the Confession which could be called—as his friend, Dr Mair, phrased it—at variance with the Confession. Truth was a union of contradictions. There were the contradictions of determinism and free-will—the aspect of God's sovereignty which the Confession of Faith represented, and the catholic aspect of the sovereignty as hidden in the words, "God is love." The responsibility that faced the Assembly that day was that it had to deal simply with the powers that the Church possessed with regard to the Confession. Two years ago he was one of those who believed there was no need for the appointment of that committee. He was thankful now that the committee had been appointed, because he thought the report that had been presented that day shed a most valuable light upon many points as to which they desired information. There could be no doubt as to the position of their Confession. He recollected a distinguished member of that House saying on one occasion that the State had established a Church but not a Confession. The very opposite was the fact. The State first established a Confession and then established a Presbyterian form of Government, and they had that now before them in admitted sovereignty. It had been said by his friend Sheriff Campbell that Dr Mair only admitted a disciplinary power. He did not agree with that. He knew this, that the powers possessed by the Church courts within the Constitution were so ample that they should take care lest in any way they imperilled them. He had the honour of speaking to some dignitaries of the Church of England lately, and what they said to him was that they were amazed at the power the Church of Scotland as an Established Church possessed, and their hope was that the Church of England might receive, or might have in some future time, similar powers. He believed they had most ample powers if only they kept within their constitutional sphere. He ventured to think that the powers which were asked by Sheriff Vary Campbell, and his very reverend and learned friend the Principal, took them beyond the sphere in which it was safe for the Church to act. The Church was asked to commit itself to a system, and they did not know where the system might end.

Dr Glasse (Edinburgh) moved that the subject be remitted to the committee for further consideration, with instructions to report to next Assembly. He said it would be a deplorable thing to put their liberties as theological teachers into the hands of the Church courts. The difficulty with the Confession of Faith was not that they were in difficulty as to some less important matters in it. The fact was that many of them not only said there were difficulties as to what might be called accidental statements in the Confession, but they had also serious difficulties with the essential principles of the Calvinistic theology. How many ministers believed in the doctrine of election—election to privilege, not service? How many believed in predestination, without regard to conduct or character? How many preached the doctrine of irresistible grace? These were not accidentals—they were the essential principles of Calvinistic theology, and he would like to know how fully they were taught in the Churches of the land. He deprecated their going before the world and trying to throw dust in the eyes of the people. Let them deal with the matter in a straightforward way. He admired the position taken up by Dr Mair,—it was the logical position; but if it went forth as the decision of the Assembly, their friends over the way would say this was exactly what they thought was the position of the Church of Scotland: it had no power to keep in touch with the progress of society, no power to adapt its doctrine to the growing intelligence of society. He did not want such an impression to go abroad. He did not think that was the position of the Church of Scotland. He believed if the Church adopted this position, it was sacrificing one of its privileges and one of its glories. He agreed with those who deplored that there should stand on the records of the Church such a decision as that in the case of Mr Macleod Campbell. But Mr Macleod Campbell received legal treatment. If the case were to come up again—and it was a case that struck at the heart of Calvinistic theology—if the case were to be tried by libel, he held that they would be obliged to depose Mr Macleod Campbell. He wanted them to get out of a situation of that kind by the adoption of such a course as had been advocated by Sheriff Campbell, namely, to exercise the large powers that the Church had in regard to determining its doctrine. Let them see what Dr Scott proposed to do by his addendum. Did he propose to stand by the Confession, or did he ask them to go away from the Confession, to shut their eyes to a great many things in conflict with the Confession of Faith? He was opposed to that altogether. Why not take up the position of saying that charges of heresy should no longer be prosecuted, seeing that the results of modern criticism and research had seriously modified their attitude to the essential principles of the Confession of Faith—that the Church in present circumstances confessed

that it was not in a position to encourage or institute charges of heresy? Why not take up a position like that? No court of law would touch them. It would be the honest, manly, straightforward position to take. Dr Scott had said with reference to the Macleod Campbell case that the statutes remained the same, but the judges were different. That was to say the judges were to shut their eyes to the essential doctrines of the Confession of Faith. Dr Scott knew that the Confession was not in harmony with what was taught by Mr Macleod Campbell, but if they could shut their eyes to a position like that, why should Dr Scott not go further, and drop heresy prosecutions altogether? It was unworthy of a great institution like the General Assembly to say, "We will allow you to teach this, that, and the other thing in the Confession, but we will not allow you to teach this other thing, because we have some prejudice against it." That was quite unworthy of the Church. The report should be sent back, and a report be brought up securing the liberties of the Church and giving the Church a little guidance in its present trying position.

Mr Joseph Mitchell (Mauchline) seconded.

Prof. Herkless (St Andrews) said that the question as to the relation of the Church to the Confession was one of conscience and of great spiritual importance. It was said that Sheriff Vary Campbell had expressed a view which amounted to this, that the Church had the power of whittling away the Confession, so that it might disappear altogether. That was a danger that they all admitted, but, on the other hand, they were practically asked to do nothing because of that danger. Well, he thought there was another danger which was deeply important. Ministers and professors were all required to sign the Confession of Faith as the Confession of their individual faith. In the House that day, Principal Story and others had declared that the living faith of the Church was not according to the letter of the Confession—that there were certain doctrines which they were not required to believe. In a spiritual institution like the Church of Christ, to ask men to sign the Confession of Faith in these circumstances was greatly more dangerous. If Dr Mair's motion were carried, there was no such thing as living faith, but simply the faith of the Church interpreted by the letter of the faith in the seventeenth century. Dr Scott told them that the Church would be lenient as between matters of importance and matters of non-importance. Was there any distinction in the Confession of Faith? How was he to draw a distinction between things that were important and things that were not? Dr Scott and he might differ as to that. Would it not be better to find some way for the sake of honesty, for the sake of spiritual consistency, to say what was the living voice of the Church at the present time in regard to what it believed? After characterising Dr Mair's speech as

Erastian, Prof. Herkless concluded by saying that it seemed to him that for the Church to confess that it could not at any time give an interpretation by Declaratory Act, or othewise, was to take away that Spiritual Independence which they had boasted as being the birthright of the Church of Scotland, and the tradition for which they had long fought, and the most splendid word of the Church of Scotland as a national institution.

Principal Story said in reply that the Assembly had actually, not in the midst of its jurisdiction upon a culprit, but in the exercise of its own view as to what was one of the dangers of the Church, expressed a distinct theological opinion. In the Act of 1696 provision was made for the discharging of ministers and members of the Church publishing or venting by speaking, writing, or printing any doctrines contrary to or inconsistent with the Confession of Faith of the Church. There was a Church acting on its own sense of responsibility without calling for a special case. The whole tendency of the arguments on the other side was that the Church had no spiritual power except that given to it and guaranteed to it by the Confession of Faith. Dr Mair's speech was the frankest and boldest Erastianism he ever heard. It might not be Erastianism in the scientific sense of the word, but they all knew what was meant in Scotland by calling a man an Erastian, and he applied that name in its fullest sense to his reverend friend Dr Mair. Dr Scott's addendum was little more than the expression of a sympathetic and gentle spirit. But if everything was to be reduced to the letter of the law, they must apply the rigid spirit of Dr Mair, and not the humane gentleness of Dr Scott. The serious question for them was, were they to regard themselves as having any interest, liberty, and right in the Church to alter the Church's expression of doctrine and belief, or were they to be bound for all time to come—because it was evident that Dr Mair was not speaking for them only—by the extremest utterance of the extreme Calvinism of the seventeenth century? If that was to be so, if they were to have no redress, it was as well to note it, so that they might know where they were and what they had to do. If any man expected the Church of Scotland or any other Church in Christendom to live and flourish during the next hundred years upon the bald Calvinism of the Westminster Confession, he was, if he (Dr Story) read the signs of the times aright, most terribly mistaken. The Church would be rent asunder if they tried too long to crush the expression of its vitality. The Bishop of Peterborough once said that he would rather see England free than sober. He (Dr Story) would rather see the Church of Scotland free than the Church of Scotland tied and bound for all time to come with the fetters of Calvinism.

A test vote was then taken.

The question was first put whether Dr Scott's addendum should be added to Dr Mair's motion, and the affirmative was carried by 155 votes to 65.

A vote was then taken for Dr Story's motion, as against the combined motions of Dr Mair and Dr Scott, with the result that 117 supported the motion of Principal Story, and 156 the combined motions of Dr Scott and Dr Mair. Only 20 voted for the amendment of Dr Glasse, which was thrown out; and after that a vote was taken by the doors between the motion of Principal Story and the combined motions of Dr Scott and Dr Mair. The result was:—

For Principal Story	146
For Dr Mair and Dr Scott . . .	178
Majority against Dr Story's motion .	32

M.

OPINIONS ON THE LEGISLATIVE POWER OF THE CHURCH.

In the original Auchterarder case, Lord Medwyn said (Robertson's Report, ii. 147):—

It is true the Church has legislative powers. In this respect it resembles a corporation or society which has the power of making by-laws for its internal government and regulation. But the Church holds this power on a still higher footing, and in this respect is altogether unlike an ordinary corporation. A corporation derives its existence and its privileges solely from the sovereign or executive power. The Church has a different origin.

Lord Meadowbank said more doubtfully (Report, ii. 108, 109):—

That a power of legislation exists in the Church, to a certain extent, no one can possibly deny. Its General Assemblies are authorised by the Confession of Faith, *which forms part of the statute law of the land*, "to determine controversies of faith and cases of conscience—to set down rules and directions for the better worship of God and the government of His Church—to receive complaints in cases of maladministration, and authoritatively to determine the same." But these

are all the powers which, in the Confession of Faith, the Church lays claim to, in any part of this, which it required the Legislature, in the year 1690, to recognise as the charter of its rights, and as exhibiting the extent of its legal powers. . . .

In like manner, in the Statute 1592, I can find no sanction for appealing to any power of legislation derogatory to or subversive of any of the municipal and legislative enactments of Parliament, or of the civil rights of the people. And holding the Church to be but the creature of the law, and that every power which it possesses is derived from the law, it must follow, as a necessary consequence, that if those powers of regulating its own affairs, which it has nicknamed a power of legislation, are exceeded, the Church, like every other body of temporal creation, must, in the exercise of its temporal powers, whether of adjudication or alleged legislation, be subject to the control of the civil magistrate represented by your lordships.

The curious inconsistency (verbal at least) between these two paragraphs of Lord Meadowbank's speech is repeated in the more important speech of Lord Gillies (Report, ii. 25, 30):—

Here again it is said that the General Assembly is a legislative body. So is every corporation. For the nature and extent of its legislative powers, I turn to Bankton, ii. 592, who there says: "The jurisdiction of the General Assembly is either constitutive or judicial. The first consists in making acts and canons ordering the method of proceeding in matters before them, and other affairs touching the discipline and government of the Church, *in the same manner as other corporations make by-laws.*" Not legislative but constitutive powers are assigned to it by Bankton. Thus its power is just that of making by-laws—a *privilege*, properly speaking, of corporations. Every corporation has privileges. The power of making by-laws is one of its privileges. I certainly mean and wish to say nothing disrespectful to the Assembly. On the contrary, I feel great regard and veneration for it. It holds, and properly holds, a high place in our constitution; but as to its legislative powers, I humbly think, with Bankton, that they are just analogous to the powers or privileges of corporations generally to make by-laws. Its laws are perfectly good, if they are completely consistent with the law of the land, and do not interfere with civil rights; but good for nothing, if inconsistent in any degree with either. Good also, if ratified by Parliament—as are the by-laws of the town of Edinburgh and other corporations. . . .

As to this claim of legislative power, I have one observation yet to make. If the claim is good, there is a union in the same body of

judicial and legislative power. This is *reprobated* by every political writer. I am aware of the Barrier Act, requiring the concurrence of the presbyteries; but that does not affect my argument. If the General Assembly of the Church combines the legislative with the judicial power, and if its judgments must take end in it as a court, then indeed its power is supreme and unexampled. But it is said that this is only in matters ecclesiastical, which obviates the danger, &c.

The chief other references which we find to legislative power are in the second Auchterarder case, the Strathbogie interdict, and the Stewarton or *quoad sacra* churches case.

In the first of these (Kinnoull *v.* Ferguson, March 5, 1841, 3 D. 787), Lord Cuninghame, Ordinary, says, in the note to the interlocutor affirmed by the Court:—

> The Scottish Legislature, from the first, gave only the most limited power to the Kirk. The Legislature prescribed their creed, fixed the constitution of the ecclesiastical bodies, by repeated provisions as to the rights of presentees, and conferred on Church courts the very limited powers legally possessed by them, chiefly in cases of examination and heresy. The Kirk, therefore, can no more, of their own authority, disregard any of these fundamental statutes than they can, by a direct law of their own, abolish the whole of the present system of Church government (as the General Assembly of 1638 did), and substitute a new one in its place. When such an attempt is made, in whole or in part (and the exclusion of a qualified presentee is of that description), it is clearly open to the Supreme Civil Court of the State, as the constitutional expounders of the statutes, to afford protection and redress to the lieges, when they have sustained injury by a manifest departure from the law.

We have already quoted a similar utterance of this judge, on p. 84, from the case of Cruickshank *v.* Gordon, March 10, 1843, 5 D. 909.

In the Strathbogie case (February 14, 1840, 2 D. 606) one of the heads of the Court, Lord President Hope, said:—

> The Church courts cannot go one inch beyond the limits which the law has assigned to them. The Presbyterian form of Church government is not an innate or self-created system. The Church, as an Established Church, did not give it to itself. The Reformation took place in 1560, and it was not till the Act 1592 that the Presbyterian

form of government was created. It was created by that Act, which is the charter of the Presbyterian Church. It was not at its creation endowed with all the powers which it would have assumed to itself in the two Books of Discipline, nor, generally, with any powers such as it might afterwards choose to assume to itself. It was created with definite powers, and under various obligations, one of which expressly was, that the presbyteries should be bound and astricted to take on trials the presentee of the lawful patron. But we are told that this Established Church, which creates by statute, may go beyond its statutory powers, and usurp whatever powers it thinks necessary for ecclesiastical purposes. Were this well founded, we should not only have an *imperium in imperio*, but an *imperium super imperium*, in this country.

We conclude the Court of Session opinions with one already quoted, of the Lord Justice-Clerk Hope, in the Stewarton case (Report, p. 60). He had by this time succeeded Lord Justice-Clerk Boyle.

Statute has specially described the species of authority given to the Established Church. Its power of government is defined in different statutes by terms which, to my mind, are clear and unambiguous; and in these statutes I find no legislative power granted to the Church, placing any changes within their competency. I do not find the recognition of any general and undefined legislative power. On the contrary, I think both the Statute 1592 and the statute at the Revolution, restoring Presbytery and embodying the Confession of Faith, exclude the least pretence to such power in the Church. These statutes are framed with most delicate and deliberate caution; and I think they settle and establish the Church of Scotland within limits the most precise, and with authority expressly limited to purposes therein set forth.

Lastly, in the House of Lords, the Lord Chancellor, Lord Cottenham, in the course of his judgment in the first Auchterarder case (Report, p. 51), said:—

If such be the construction of the statutes, of what purpose can it be to consider the supposed legislative power of the General Assembly? For it cannot be contended that there can exist in the General Assembly any legislative power to repeal, control, or interfere with enactments of the Legislature—so that even if the subject-matter were found to be within the general legislative power of the General Assembly, it would be powerless as to such subject-matter, so far

as it is regulated by statute. It would, therefore, be beyond the powers of the General Assembly to interfere with the right of the patron, as secured by statute, by adding to the powers of the presbytery.

But this legislative power claimed for the General Assembly is confined to ecclesiastical matters; and it is insisted that the matter to which the Act of 1834 applies is ecclesiastical. Now, although it is clear that if it were so the legislative power of the General Assembly would be controlled by the statute, it is worth considering whether the matter in question can be considered as ecclesiastical. . . .

Another ground upon which the Act of 1834 has been justified, and which is recited in it as the foundation of it, is, that it is a fundamental law of the Church of Scotland, that no person shall be intruded in any congregation contrary to the will of the people; and that the Act is only an arrangement to carry that principle into effect. Whether that is, or ever was, a law of the Church of Scotland is perfectly immaterial, if the statutes contain enactments and confer rights *inconsistent* with any such principle, or with the execution of any such law.

BOOK II.

THE CHURCH OUTSIDE ESTABLISHMENT

CHAPTER I.

1733 TO 1843.

THAT law has to do with Established Churches, and may have to do with their creeds, is obvious and intelligible. But it does not at first sight appear that law has anything to do with Churches which are not established; and lawyers on the one hand, and churchmen on the other, would be well pleased if the separation between the two could be made permanent and complete. Such a complete separation is impossible, under any conceivable jurisprudence; and it will be our duty, in the remainder of this volume, to bring out how, in the jurisprudence of Scotland, the relation of such Churches and their creeds to the law already forms a chapter of much importance and difficulty.

Toleration was long unknown in the law, as in the history, of Scotland. The intense sentiment of national unity was strongly against it. The nation was one, and the Church became one. The Church claimed to be the Church of Christ in the realm, exclusively and of divine right. The State so far acknowledged it as even to declare statutorily that those who did not believe its doctrine and communicate in its ordinances were "no members of the Kirk of Christ so long as they keep themselves so divided from the society of Christ's body;" and the sentence of excommunication, pronounced by the Church on heresy in the exercise of its own jurisdiction, was followed by civil pains and penalties. The Church brooked no rivals, and tolerated no individual and far less any collective dissent. Claiming independence of the State, it at the same time demanded

full and exclusive recognition from it; and it used against all dissent both its proper and its borrowed power. The war between Presbytery and Episcopacy was so bitter, very much because neither party contemplated the possibility of their coexisting side by side. The obligations of the National Covenant of course greatly strengthened the feeling of religious unity; and the Solemn League and Covenant came into existence just at the time when the first symptoms of modern disintegration began to be felt in England. The Scottish Commissioners went to the Westminster Assembly to work out the "covenanted uniformity in religion;" and the new doctrine of the "toleration of sects" which met them there they most earnestly resisted.[1] The restoration of Charles II. brought back Episcopacy to both England and Scotland; but what was soon acquiesced in by the former kingdom was felt as a foreign yoke in the latter, and in 1688 the royal institute was overthrown in a day. Presbytery was by statute declared to be the only government of Christ's Church within the kingdom; and the dissenting, or nonconformist, or seceding Churches which now exist, commenced their course without any reason or theory being struck out upon which the law could recognise their existence.

THE EPISCOPAL CHURCH IN SCOTLAND claims precedence as the most ancient of these bodies, as having been once established, and as still standing over against all the others in the possession of a polity held essential by so much of Christendom, and held dear by so much more. Identical before the Revolution with the Presbyterians in ritual and creed, and seemingly willing at that crisis to have surrendered whatever elements of individuality it did possess, it was driven into independence against its will; and, in spite of the curious infelicity with which it has attached itself to every failing cause in the history of Scotland, it has survived to represent a great ecclesiastical principle, and possibly to enact a more important part in the future.

[1] See Baillie's Letters, *passim*.

Coeval with it, or at least like it dating a separate existence from the Revolution, we may note the REFORMED PRESBYTERIAN CHURCH, or Cameronians, who would not enter the Established Church on account of the alleged defects in its reconstitution. Their long contest with their friends within the Establishment as to the legal import of the Revolution Settlement was, after one hundred and fifty years, decided in favour of the outsiders by the courts of law themselves; and thirty years later, in 1876, the great bulk of the ancient Cameronian Church joined the Free Church, now itself outside. Neither of these two eldest Churches was originally in a position to familiarise the law with the doctrine of toleration. The Cameronians objected to the doctrine altogether, and the Episcopalians had the suspicion of disloyalty added to the fact of their dissent. All the more important was the Act 10th of Queen Anne, cap. 7, which we have already had occasion to notice, and which for the first time, and in the interest of the Scottish Episcopalians alone, forced upon our courts the recognition of *a Church* other than *the Church* which the law established, and extended to that other Church in its worship and functions a certain measure of positive protection. But it provided in addition, and without special reference to Episcopacy, that "no civil pain or forfeiture or disability" was thenceforward to follow on excommunication in Scotland, and the magistrates were ordered not to enforce obedience to such a sentence. This, the only Scottish Toleration Act, we give in full in the appendix.[1]

But these Churches of the Revolution were not the most important of the nonconformist bodies of Scotland. During the eighteenth century the SECESSION CHURCH and the RELIEF CHURCH, with their various subdivisions,[2] in the

[1] See Note A.

[2] Scotland has never been able to plead (in the words of the Compte de Narbonne to Napoleon I.), "Sire, il n'y a pas assez de réligion en France *pour en faire deux;*" and at the time when this book was first issued, the divisions of Scottish dissent were so numerous as to make a map all but necessary. Fortunately we have now advanced far into accomplished reunion and reconstruction.

nineteenth generally merged into the one "United Presbyterian Church of Scotland," were the most important body of Scottish dissenters—if indeed we may apply to them such a name. For the great peculiarity of Scottish dissent has been, that it was not properly dissent at all, and rather repudiated the name. Not merely was it the same in doctrine, discipline, and worship, with the Church of Scotland, but the desire to maintain that doctrine, discipline, and worship unimpaired was the cause (at least in the case of the earlier or Secession Church of 1733) of its very existence. It separated — or, in its own phrase, *seceded* — from the majorities of the Church, from a regard to that Church's honour and faithfulness; and even its bitterness was the perverted flow of love. The word they chose was one which should express not dissent from false doctrines, but separation from unfaithful men; not an abnegation of their old tenets, but merely a change from their former surroundings. The Scottish secessions were largely conservative—looking back to a golden age of Church purity and independence; and the greatest of all, that of 1733, was eminently so. We must refer to histories of the time for the narrative how patronage and other grievances gave occasion to this movement; but sufficient evidence will be found in their subjoined manifesto,[1] that they carried the old passion for Scottish Church purity along with that (equally charac-

[1] "We hereby adhere to the protestation formerly entered before this Court, both at their last meeting in August, and when we appeared first before this meeting; and further, we do protest in our own name, and in the name of all and every one in our respective congregations adhering to us, that, notwithstanding of this sentence passed against us, our pastoral relation shall be held and reputed firm and valid; and likewise we protest that, notwithstanding our being cast out from ministerial communion with the Established Church of Scotland, we still hold communion with all and every one who desire with us to adhere to the principles of the true Presbyterian Covenanted Church of Scotland, in her doctrine, worship, government, and discipline; and particularly with every one who are groaning under the evils, and who are affected with the grievances we have been complaining of, who are in their several spheres wrestling with the same. But in regard the prevailing party in this Established Church, who have now cast us out from ministerial communion with them, are carrying

teristic of their party) for Church independence. But as years passed away, the latter principle gradually became stronger; and in the second Secession, when Mr Gillespie in 1752 originated the Relief Church, the doctrine of the spirituality of the Church, and its freedom from State control, had acquired preponderance. Gillespie himself had originally signed the chapter of the Confession of Faith as to the power of the civil magistrate in matters of religion with an explanation or modification. He was deposed by the Assembly in Dr Robertson's time, because he refused to take a personal part in ordaining a presentee over a reclaiming congregation, and the majority of the Church had determined to exact on this point not merely passive, but active and individual, obedience. The Churches founded by himself and his friends, being consequently very much Churches of *relief* from the active despotism of an Established Church, laid more stress on freedom of conscience, and less on the old Scottish uniformity, than had hitherto been done. And as years passed on, the contest of those in both communions who had left the Church naturally came to be not with the Moderate party but with those who, holding the same principles within the Church with themselves, had yet not seceded. Men who held spiritual independence, whether within or without the Established Church, agreed in condemning the practical administration of the matters of that

on a course of defection from our reformed and covenanted principles, and particularly are suppressing ministerial freedom and faithfulness in testifying against the present backslidings of the Church, and inflicting censures on ministers for witnessing, by protestation or otherwise, against the same: Therefore we do, for these and many other weighty reasons to be laid open in due time, protest that we are obliged *to make a secession from them*, and that we can have no ministerial communion with them till they see their sins and mistakes, and amend them. And in like manner we protest that it shall be lawful and warrantable for us to exercise the keys of doctrine, discipline, and government, according to the Word of God, and *Confession of Faith*, and the principles and constitution of the Covenanted Church of Scotland, as if no such censure had been passed upon us. Upon all which we take instruments; and we hereby appeal to the first free, faithful, and reforming General Assembly of the Church of Scotland." See 'History of the Secession Church,' by the Rev. John M'Kerrow, D.D.

Church by the dominant party, as being a denial of that principle. But while those who remained in held this to be merely an abuse, those who had left soon came to argue that it was more or less essential to the very existence of an Establishment. A great revolution of opinion on this point passed over the minds of men in Europe and America, and the crisis has left considerable traces in the precedents of our law. The larger masses of these secession Churches became Voluntary, though minorities objected to the change, and split off to emphasise their adherence to the old doctrine. But the majorities received what was called the "New Light" hospitably, and a great controversy arose on the principle of Establishments, which in last century swelled into a storm. It was perhaps about to spend itself, when a strange climax occurred to the whole history. The spiritual independence party *within* the Established Church obtained the majority, and immediately, as we have seen, used their power to carry out their ancient principles. The result was that, being met and challenged by the law, they preserved indeed their own consistency at the expense of extreme sacrifice, but one great point of the argument in the question with the Voluntaries was finally decided against them. We observed above that the conditions of the Revolution Settlement have now been decided by law to be what the Cameronians had ever since 1688 held them. We must add that the whole conditions of Establishment have also been decided by law to be what the later Seceders, as distinguished from the elder, accused them of being. The principle of these decisions, as expressed in repeated powerful opinions of the majority of the Court, is, that not merely the Revolution Settlement, but the whole establishment of the Church of Scotland, *ab initio*, was upon grounds irreconcilable with the claims of the Church party, as these were put forward by Andrew Melville in the Book of Discipline, and have been held since by all the sections above enumerated. The Free Church no doubt left upon the table of the Court and the Legislature its "Protest"

that this was a misreading of the legislation of Scotland. But even the Free Church did not venture to deny that this reading has now been given, and that it has been given authoritatively by the functionaries who are entitled to declare what the meaning and intention of the law has been throughout all those ages. The protest of the Free Church was, that the conditions of establishment have been changed. But the doctrine of law is, that the conditions of establishment have really been ever since 1560 what they are now defined to be, and that the connection of the Church of Scotland upon these conditions with the State is indissoluble. One step more. No one can carefully study the judgments following the Auchterarder case without seeing that their *principle* is not only that there has been, but that there can be, no establishment of a church by the State except on the principles of subordination there laid down. It is clearly put in many of these, and it is implied in all of them, that the old claim of Church independence and co-ordinate jurisdiction is absolutely unrealisable except on the condition of practical Voluntaryism. The defeat of 1843, claimed by the Free Church as a moral triumph, may certainly be claimed as a legal triumph by the United Presbyterians, even for theoretical Voluntaryism. And their moral triumph also has now been attained, in the union of the two bodies into the United Free Church of Scotland in 1900.

Reverting, however, to the earliest days of the dissenting Presbyterians, it must be remembered that the Reformation statutes are a solid block of intolerance. The whole idea of that settlement was that there is "no other face of church nor other face of religion than is presently by the favour of God established within this realm." It follows that our judges in the eighteenth century, like Lord Mansfield and others in England, must have had serious difficulty in commencing the effort—protracted throughout the nineteenth and by no means yet finished—to recognise the rights of churchmen outside, with their Churches and congregations.

The earliest case in the long series is that of the "Seceding Meeting-House at Bristo" in Edinburgh,[1] where the Court expressly refused to acknowledge the legal existence, not merely of dissenting Churches or bodies, but even of their congregations. The Bristo congregation had called upon certain trustees, in whom the title of their church building had been vested, to denude in favour of new trustees named by them, "in terms of powers to that effect in the title." They refused. The new trustees sued, and it was objected that neither they nor their constituents had a legal standing. Lord Elchies, who reports the case, and who was Lord Ordinary, thought they had. But the Court "found that the pursuers had no legal title to pursue, *their constituents being no legal congregation.*" A month later "the like was found" in the case of the Eaglesham congregation (Pollock), but in the judgment pronounced here there was no such clear infringement of the law of trusts, for there had been no written "obligation to denude."

It was twenty years before the first right step was taken, and it fell to be done by the famous Lord Monboddo as Ordinary. The case of Wilson[2] in 1771 is the first of an important series in Morison's Dictionary under the word "Society." In it the congregation pleaded broadly that they were "a legal society entitled to protection by law;" and the Court sustained the Ordinary's finding that, in respect the defender admitted "a trust in his person for behoof of the Anti-Burgher congregations," he was bound to denude in their favour. But even here they first struck out the designation of the pursuers, as suing "in name of the Associate congregation of Dundee, *subject to the Associate Synod;*" as they erased, so late as 6th July 1809 (Farquhar, Fac. Coll.), the equally harmless designation of "Bishop of the Episcopal Communion in Scotland." Twenty years after Wilson's case this decision sustaining dissenting

[1] Bryson (known as Adam Gib's case), 30th June 1752; reported in Elchies' Decisions, along with Pollock, under head "Title to Pursue."

[2] Mor. 14,555.

trusts was confirmed in the "Berean" case of Allan (1701);[1] and here as on the former occasion the congregation claiming seems to have elected its trustees by a simple majority.

The principle of toleration of non-established congregations being thus attained, the Bench proceeded to apply it to the matter of their Church jurisdiction. And they did it, in two important cases, with a firmness and discrimination which their successors, down even to the close of the following century, have not yet excelled. The first and most instructive is that of Auchincloss (6th March 1793),[2] the Lord Ordinary in which was afterwards Lord Justice-Clerk Macqueen (better known to Scotland as Lord Braxfield, and outside of it as the formidable original of "Weir of Hermiston"). We are told that he "refused to review" the Associate Synod's findings, "so far as they regarded an ecclesiastical offence." But his interlocutor, maintained by the whole Court, is still more explicit. In it he "does not consider it *competent* for this Court to review the proceedings of Associated congregations, commonly called Burghers, when sentences are pronounced by them in their ecclesiastical character." The weight of this decision[3] is greatly enhanced by two reservations which were made. For on the one hand the deposed Associate minister, who "argued the point of jurisdiction" in the Court to redress his injury, found them unanimous that he had no case, unless he averred and proved *malice* as existing under the ecclesiastical guise. And on the other the same judge, who refused as Ordinary to touch the ecclesiastical sentence, sustained the competency of certain proceedings between the parties "respecting the relevancy of an investigation as to which of the parties was supported by a minority of the congregation." This, however, was as to a new chapter in our law—the question of Church property. But before touching it we must record the case

[1] Mor. 14,583.

[2] Hume's Dic. 595; and mentioned also in the Reports of Dunn (F.C. No. 14, p. 29; and Mor. *voce* "Society," App. 16).

[3] The decision as to *competency* was long after repeated by the first Lord Moncreiff in the unreported case of Osborne, 5th July 1831. His interlocutor will be found on a later page.

of a second congregation, who either called themselves, or were called, by the honourable but eccentric name of Bereans. Of these modern Bereans the reporter says (seemingly without any idea that something like it may have been the case also with their Macedonian prototypes), "It is a fundamental rule of their policy and discipline that every member shall watch over the moral and religious deportment of his brethren, and submit the matter, if he find anything amiss, to the cognisance of the congregation, whose decision shall be final." In the case of Grieve [1] the rule of "telling it unto the Church" had been followed, but accompanied by some tale-bearing and unnecessary imputation outside that body, and an action of damages was brought for defamation. The Lords cut down the award proposed by the Lord Ordinary to a small sum, on the ground that "everything must be laid aside which passed, judicially in some measure, at the meetings of the congregation, and according to the rules and usages" of the little Church of which both parties were members.

Before the opening of the nineteenth century there was a certain reaction on the Scottish Bench, as there was everywhere else in Britain, against the American and Continental ideas of toleration. But just after that century began the Court found itself called on to face the whole question of the Church outside establishment in connection with that Church's property—a matter which we must now deliberately take up.

For it is with regard to questions of property that it becomes most plainly necessary for courts of law to elaborate a principle and lay down a rule for dealing with differences in religion. If a body of men have wrongful possession of a church, or of a sum of money—on the pretence, for example, that they are the religious body to which the money or the building was destined—their opponents have no way of redressing the wrong and vindicating their own

[1] 12th February 1808. Reported in Baron Hume's Dictionary, p. 637.

rights, except by appealing to the civil tribunals of the country. And these civil tribunals have no means of doing justice, except by investigating into the differences—of doctrine, discipline, or practice—which to the litigants may be religious differences, but to the judge are mere matters of fact bearing upon a question of civil right. Accordingly, it is chiefly through questions of property that the law of Scotland has been called on to interfere with dissenting Churches, and it is almost exclusively through such questions that it has taken to do with their creeds.

Before commencing the history of this subject, it must be remembered that, when we speak of the property of a Church, the expression is inaccurate. By the common law of Scotland Churches do not hold property. Even the Established Church does not;[1] for while the minister has a liferent of the manse and a stipend out of the tithes, both tithes and manse are apparently the property of lay heritors as well as under the control of the State. But outside establishment, a Church is not a Corporation; and it is, therefore, not regarded in law as an individual. "In former times," one of our lawyers remarks, "the erection of corporations for the advancement of religion, learning, and commerce, formed an important department of public policy;" and in some great jurisprudences at the present day—notably in those of America, where Presbyterianism has found its western home—the erecting of Churches into corporations, or at least the erecting of corporations which shall represent Churches, and hold Church property by a perpetual tenure, is almost universal. But in Scotland, where "there can be no corporation without a charter from the Crown, express or implied," Churches have not been in use to ask, nor the Crown to grant, the privilege of incorporation. And one important result of this is that our Scottish Churches hold no property directly. All their property is held by individuals *in trust* for them; and the chapter in our law which treats of Church property comes

[1] Duncan's Parochial Ecclesiastical Law, 221.

to be a chapter of the law of trusts. Further, it was long after the date with which we deal that even the law of trusts came to be an efficient protector in Scotland of the rights of Churches, as distinguished from the rights of congregations. Originally, as we have seen, our courts declined to acknowledge the trust rights even of congregations. And when that was conceded, they still had difficulty in ascertaining—for some time they had little desire to ascertain—the trust relation of these congregations to the bodies of which they were part. It was not till the middle of the nineteenth century that the policy of the modern Legislature made provision for a possible perpetual trust in the officials of any Scottish "congregation or society" [1]—a trust which may practically be almost an incorporation. And it was not till about the same time that the greater Churches outside Scottish establishment, warned by experience, provided elaborate trust deeds to express, in the very tenure of Church property, what seemed to them the true relation of individual congregations alike to Presbyterian unity in general, and to Scottish reunion and reconstruction.

But in the eighteenth century the Scottish courts had no such assistance. And they declined as much as possible, though on various grounds, to meddle with the matters of dissenting Churches. This comes out as strikingly in questions of property as in questions of jurisdiction. Down to the year 1813 the universal principle of our Court was, when any such question arose, to abandon the decision of it to the Church itself. The only difference in its practice was that in some cases the Bench left it to the congregation—*i.e.*, to the majority of the congregation; in other cases to the whole Church—that is, to the majority of the whole Church or body. This course of conduct had, as we have seen in parallel cases of jurisdiction, a twofold origin—a feeling on the one hand that dissenting bodies ought to be ignored by the law, and on the other a feeling that

[1] 13 Vic., c. 13.

bodies which sacrificed so much for the sake of separation and independence ought to have their independence respected. The desire to ignore such bodies rather tended to make the Court leave questions of property to be decided by the local majority—the majority of the *congregation* more immediately concerned: the other principle led (though later) to their leaving it to the decision of the presbytery, synod, or other judicatory of the general body. But on both principles, and on either course, the result was that the Court declined to investigate any doctrinal questions existing between Dissenters, and when the possession of property depended on such questions, gave the property to the party in whose favour the Church (*i.e.*, in general the congregation) had itself decided.

The real difficulty of the property question came out first in the Aberdeen case of Dunn, 13th May 1801 (Morison's Dic., *voce* "Society," App. I., p. 10). It was (more distinctly than any of the earlier cases) a question between the "Old-Light" and "New-Light" parties in the Secession—a majority in this congregation claiming their meeting-house against the minister and a minority, whose counter-claim to it had the sanction of the (now New-Light) Synod. The Court held unanimously that the spirit, if not the letter, of the law of Scotland now gave congregations of the Secession "toleration and protection," but they were divided as to how it could be worked out. Ultimately they gave the property to the congregational majority (against the minister and the Synod). The grounds of judgment, however, retain some of the old intolerance in the view that the minister "cannot be *allowed* to represent his office as flowing in any shape, or deriving permanency, from the proceedings of what may be called a synod or other ecclesiastical court of his sect." And the general view on which this result was based was, that "the Court can enter into no investigation as to the religious grounds of the schism here, and if they did, they must presume the majority to be in the right."

These positions were unsatisfactory; and as the Old-Light and New-Light controversy still spread (a controversy, be it remembered, chiefly about the unjust and intolerant powers ascribed in early days to the civil magistrate),[1] the case of a church in Perth "was selected out of many then occurring, to try the general point again more deliberately," or, as another judge puts it, "with the very view of fixing and settling a general question." It was certainly tried deliberately, for it lasted twenty years—1800 to 1820—and came twice before Lord Chancellor Eldon, after having engaged the energies, at the Bar and on the Bench, of some of the greatest names in the law of Scotland. The Perth case of Davidson *v.* Aikman, or (as it came to be better known from the name of the appellant) the case of Craigdallie, is well reported as well as commented upon; and from the various accounts of it in the Faculty Collection,[2] in Morison's Dictionary,[3] in the Appeal Cases of Mr Dow,[4] Mr Bligh,[5] and Mr Paton,[6] the notes of the judge's opinions preserved by Sir Islay Campbell,[7] and the investigations of Lord Meadowbank [8] and the Lord Justice-Clerk Hope,[9] we have the opportunity of estimating the step now taken. Our law has never taken a greater step in dealing with the property of Churches not under statutory control.

The first decision in the Craigdallie case was given by

[1] The preamble to the Act of the Associated Synod in 1795 was as follows: "Whereas some parts of the standard books of this Synod have been interpreted as favouring compulsory measures in religion, the Synod hereby declare that they do not require an approbation of any such principle from any candidate for licence or ordination. And whereas a controversy has arisen among us respecting the nature and kind of obligation of our solemn covenants on posterity, whether it be entirely of the same kind upon us as upon our ancestors who swore them, the Synod hereby declare that, while they hold the obligation of our covenant upon posterity, they do not interfere with that controversy, as tending to gender strife rather than godly edifying."

[2] xiii. 481.

[3] Mor. Society.

[4] Dow's Reports, i. 1.

[5] Bligh's Reports, ii. 529.

[6] Paton's Report, Craigie and Stewart's Appeals, vi. 626.

[7] Also in Paton's Report.

[8] Campbeltown case, *infra*.

[9] Kirkintilloch case, *infra*.

the Court of Session on 16th November 1803. It found that there was a trust

> for a society of persons who contributed their money for purchasing the ground, and building, repairing, and upholding the house or houses thereon, under the name of the Associate Congregation of Perth ; and so far repel the defences, . . . and find that the management must be in the majority, in point of interest, of the persons above described ; and before farther answer in the cause, remit to the Lord Ordinary to ascertain what persons are entitled to be upon the list of contributors aforesaid, and whether the majority aforesaid stands upon the one side or the other,

thus nearly reaffirming the doctrine of their previous decisions. In these previous decisions they had given the property to the majority of the congregation: here they gave it to the majority in point of interest—a variation which pointed out still more emphatically that they did not intend to inquire into the purposes for which the building was destined. "The decision," it was said long afterwards in the Kirkintilloch case, "was as irreconcilable with the law of toleration as with the law of trusts." This criticism seems almost justified by the statements of Sir Islay Campbell, in pronouncing judgment with the majority of the Court :—

> The sole question is, Who are the majority of this body of individuals assuming the name of a congregation, and who are the trustees named by them? . . . As to the Associated Synod, the Court can take no notice of such a body of men as a superior judicature. . . . When parties come regularly before a court in order to have their differences on points of civil law determined, they must found their pleas on common established grounds of law, and the judge cannot listen to the peculiar doctrines, either of ecclesiastical discipline or of moral or political system, adopted by voluntary associations of men uniting together for any purpose whatever.

But the rights of Churches, as sects or bodies, have never been more vigorously pleaded than in this case. Their Church, they submitted, "was a voluntary association of a great body of men, possessing unity of sentiment in doctrine and discipline, and subjecting themselves to the

control of certain ecclesiastical bodies whose authority they acknowledge in all spiritual matters. . . . According to the principles of toleration, there is nothing to hinder this, and they may hold property by the intervention of trustees." The argument against the judgment of 1803 was powerful, and by the following year some of the judges had been changed. Accordingly, the case again coming up according to the forms of process then used, the majority went the other way. The Lord President Hope's opinion (he was then Lord Justice-Clerk) is noted by Sir Islay Campbell, and may be taken as representing the view which the Court now took. It gives tersely enough the reasons against the mere principle of a majority:[1] "This congregation did not mean to become Independents. They meant to continue Presbyterians. If a minister is deposed by his own judicatories, we must give effect to it, even *in civilibus*. Complete toleration is not substantially different from the Establishment. The essence of it is subordination. . . . I have no access to know who are the real Burgher Seceders, but the judicatories themselves." And accordingly the judgment of the Court now was as follows (1st February 1804):—

Alter the interlocutor of 16th November last, and find that the property of the subjects in question is held in trust for a society of persons who contributed their money, either by specific subscription or by contribution at the church doors, for purchasing the ground, and building, repairing, and upholding the house or houses thereon, or for paying off the debt contracted for these purposes, *such persons always*, by themselves or along with others joining with them, *forming a congregation of Christians continuing in communion with, and subject to, the ecclesiastical discipline of a body of dissenting Protestants*, calling themselves the Associate Presbytery and Synod of Burgher Seceders.

The *first* judgment, therefore, gave the Perth church to the majority of the contributors of the congregation; the

[1] And as to pecuniary interest, the Bench was no doubt influenced by the consideration that comes out afterwards in Lord Eldon's speech, that it was practically impossible to collect and weigh the votes of all the contributors, original and otherwise, according to their contributions long since, perhaps, forgotten.

second, to that part of these congregational contributors which adhered to the Presbytery and Synod.

Both went on the principle of rather dismissing the case than looking into it. And in 1804, as in 1803, no real inquiry was made whether the congregation, or either division of it, or the Synod, or the dissidents from it, adhered to their original principles; or whether, and how far, subordination to their courts was part of these principles. The same judge who, in the Kirkintilloch case, had condemned the principle of a congregational majority, goes on to say that this second judgment also "was manifestly against the leading principle in the law of trusts." And he holds that "the mistake consisted in taking as decisive what was only one element, and it might be an element of no importance" (namely, adherence to the judicatories), "in the inquiry what was the original trust." But in truth the real objection in both cases is the same—the question was dismissed rather than decided, and the rights of minorities were ignored. To the last our Scottish judges showed a little of the characteristically Roman feeling of the Proconsul of Achaia, who said, "If it were a matter of wrong or wicked lewdness, O ye Jews, reason would that I should bear with you. But if it be a question of words and names and of your law, look ye to it—*I will be no judge of such matters.*" But it does not appear that Gallio had any question of property, or even of civil right, before him on that occasion;[1] and our Scottish judges had.

[1] This point may be worth looking at. It is sometimes rashly inferred that because the Roman proconsul "cared for none of those things" which were at this time brought before him, he therefore acted with careless injustice in refusing to consider them. On the contrary, his speech is a perfect expression of the wise and haughty justice of Rome. There can be no doubt that he was bound to dismiss the complaint. But it is sometimes assumed that, on the same grounds on which he dismissed this complaint, he would have been entitled to get rid of all such questions, however they were brought before him—or at least, that being, as we may assume, disposed to get rid of them, he would on the same grounds have been able to do so. This is certainly not the case.

Annæus Gallio was seemingly at this time newly come to his procon-

Both interlocutors went up to the House of Lords for its judgment; and Lord Eldon's ruling, that in all such cases the Court must look to the original purpose of the trust,

sulship; but he could not have long remained a judge to that nation without finding cases in which a "matter of wrong"—ἀδίκημα—coming before him could only be put right through means of an inquiry into some of the religionisms of the confused time. He could not, at least, always refuse an action in the same summary way to those who complained. If instead of the Jews saying to the unsympathising governor, "This fellow persuadeth men to worship God contrary to the law," Paul had complained that they had turned him out of the synagogue with violence, or had refused him and his friends a share of the benefactions left in their hands by some devout and honourable person for all Jews who should hereafter come to Corinth, a personal action would seem to have been competent to the aggrieved. (It may be very doubtful, indeed, whether Paul would have availed himself of this right of complaint. Instead of doing so, both here and in Ephesus he "separated himself"—evidently much against his will—from the regular synagogue, and opened another hard by.) But if his excommunication involved direct pecuniary loss or penalty, the complaint might have been *prima facie* competent. And the *exceptio* or defence of the accused would be that Paul was no Jew; for "after a way which they called heresy so worshipped he the God of their fathers;" unless, indeed, they confined themselves to the preliminary objection, that on all matters connected with the synagogue they had full authority by the consent of the worshippers themselves. But whichever the objection might be, the proconsul would consider it, and would perhaps send it, along with the accusation, to a Judex for his decision. —Or let us take the most important case at once. Six years after this occurrence, Sosthenes and some of his fellow-rulers of the synagogue might again have appeared before the judgment-seat, complaining that by the gradual growth of this heresy two-thirds of the Jewish community had now adopted the views of the Tarsus enthusiast, and that the majority having usurped the control of the synagogue in which their fathers had prayed, now refused to permit any one to use it except in worship of that Jesus who had been condemned as a deceiver by the central authorities at Jerusalem. And the vindication of their building—their demand that it be given back to them exclusively—would be founded, not on the allegation that the new religion was false, but on the allegation that it was another religion from that for which the building was intended. What would be the answer of Crispus and Gaius, and the other elders of the "church of God which is at Corinth"? Unless they had wholly lost the spirit of their apostle, who said, "I stand at Cæsar's judgment-seat, where I ought to be judged," but who thought himself happy to stand there in presence of King Agrippa, because he knew the king "to be expert in all customs and questions which are among the Jews," they would have accepted the challenge with the ut-

has governed the law from that date. The principle was settled in the Chancellor's speech of 14th June 1813.[1] Much important discussion has since taken place upon the Bench as to the meaning and scope of this judgment—an elaborate exposition of it pronounced in 1837 by Lord Meadowbank,[2] and seemingly acquiesced in at the time by the Scottish Bench, having been impugned and repudiated by the Lord Justice-Clerk Hope in 1850.[3] Both judges went into the history of the case, with the view of bringing out their several interpretations of the judgment, and some comparison of these commentaries with each other, and with Lord Eldon's text, may be found interesting.

Lord Eldon, in his judgment delivered on 18th June 1813, and given in Mr Paton's Reports as taken in short-hand by Mr Gurney,[4] commences by stating the very great

most alacrity. And their defence as Jews would be not only that Christianity was true, but that it was essentially the religion of their nation. They would plead not only that they worshipped the God of their fathers, believing all things which are written in the law and the prophets, but that they *alone* clave to the promise to which their twelve tribes instantly serving God night and day for so many ages had hoped to come, and that it was their opponents who had apostatised from the central hope, for the cherishing of which the nation existed and the synagogue was built. The proconsul could hardly refuse to decide a simple question of property. Yet the question of property (or use) could not well be settled without deciding first the whole great question of Church identity which Paul argues in many a fiery page — unless, indeed, the Roman had acted like our earlier Scottish judges before Lord Eldon's time, and simply given the property to the majority (of members of the synagogue, or builders of the synagogue, or rulers of the synagogue, for all these were tried), without any inquiry into opinions at all. But even this (which is the course to which Scottish churchmen, too, have always leaned) implies that the action is not dismissed as incompetent, but entertained and decided.

For an illustration of how this worked itself out in an actual case —that of the *domus ecclesiæ* of Antioch when claimed by Paul of Samosata under Aurelian — I must refer to a small 'Historical Handbook of Church and State' (T. & T. Clark, Edinburgh), p. 16.

[1] Reported in vol. i. of Dow's Appeal Reports, p. 1, and much more fully in Paton's Appeal Reports, vi. 626.

[2] Galbraith *v.* Smith (Campbeltown case), 10th March 1837, 15 Shaw, 808.

[3] Craigie *v.* Marshall (Kirkintilloch case), 25th January 1850.

[4] Craigie and Stewart's Appeals, vi. 626.

importance of the case, though it did not appear to him to bear upon the doctrine of toleration in the way that had been supposed. He was prepared to tolerate the jurisdiction, not of the congregation only, but of the Synod, as ruling the case, if that were shown to have been the original contract. But no such contract was proved. And while the interlocutor referring the property to the majority of contributors (many of them now dead) was impracticable, that giving it to those adhering to the Synod might be found to be even contrary to the original principles of the body.

My lords, upon the doctrine itself I will only state, with respect to the English law, to which the attention of the Court of Scotland has been called in some degree, I have no doubt, if it leaves an estate in trustees to be used for the purposes of religious worship, the courts of this country, acting upon the principles of toleration, will enforce those persons to permit the property to be used for the purposes of that religious worship to which it was devoted. If the instrument contains in it a provision for the case of schism and separation among the members themselves, I apprehend the courts themselves will act according to the provisions so contained; but I have not yet met with a case that authorises me to say that it is as clear as the Court of Scotland appears to think it, that if we have an instrument of trust, devoting property to purposes of religious worship, and making no provision for the case of schism or separation, that property being acquired by the trustees at the expense of the *cestui que trusts*, and being acquired for the benefit of the *cestui que trusts* in matters of religious worship, in which they are all interested, I have not found a case which authorises me to say, that if that society should separate from each other in point of religious opinion (and I particularly beg my learned and noble friends' attention to this), a court in this country would enforce the trust for the benefit of those, not who have adhered to what was originally the religious principle upon which they founded the Church, but for the benefit of those who appear to be a mere majority (if they were a majority), much less if they were a minority, much less for the benefit of those if they were not one to ten (which is the principle which must be considered as running through these interlocutors), not adhering to the principles upon which the society was formed, but departing from them, and that in point of pecuniary interest, those who adhered to their original principles should forfeit all their property, and those who departed from their original principles

should, notwithstanding that departure, not only have their own property in the meeting-house, but the property of the other original subscribers. I have found no case whatever which authorises such a decision. If it can be made out that this society originally said this, We will contribute our money for the purposes of building a meeting-house, and we will place ourselves under the jurisdiction of the Associate Presbytery, and afterwards of the Associate Synod, and placing ourselves under the jurisdiction of the Associate Synod, we agree that the Associate Synod shall direct the application of this place so built;—that is matter of law, and the contract will apply to the law. But I have found no such contract; and upon the fullest consideration I have been able to give to the subject, I propose, when we meet on Wednesday morning, to move your lordships that this should be sent back to the Court of Session, with two findings, which the circumstances of the case, I think, will authorise me to propose to your lordships: the one, that it appears in matter of fact, that this house and ground was originally purchased and built, and the property vested in four persons, for the purposes of religious worship, by individuals united in their religious principles and persuasions, and proposing to continue united in such principles and persuasions; but, *secondly*, that it does not expressly appear as matter of fact (I will not say impliedly, for that must be left to the Court, but that it does not expressly appear) to what purposes it was the interest of all these individuals, or any of them, should be applied if they should happen to differ in opinion; and with these findings, the one affirmative and the other negative, I shall propose to your lordships to remit these two interlocutors, upon which I have observed, to the Court of Session.

The case went back to the Court below, and after "condescendence, answers, replies, and duplies," and the lapse of some years, the Court of Session found that, "as far as they are capable of understanding the subject," the pursuers (*i.e.*, the minister and the Old-Light party in the congregation) had failed to show any deviation on the part of the defenders (adhering to the Synod and the now modified Formula) from their original principles, or that there was any *real* difference between the two parties, and consequently that the case did not arise in the view of which the House of Lords had ordered inquiries. Lord Eldon, on 19th July 1820, confirmed this decision, adopting also the unusual clause by which the Scottish Court qualified its judgment; but in doing so, he took occasion to recapitulate the general views

he had laid down seven years before, in the following words:—

When this matter was formerly before the House, we acted upon this principle, that if we could find out what were the religious principles of those who originally attended the chapel, we should hold the building appropriated to the use of persons who adhere to the same religious principles; and in that view it became necessary to determine whether any, and if so, which of the persons who were contending for the use of this place of worship adhered to, or had ceased to adhere to those which were originally the religious principles which led to the establishment of this place of worship, with a view to determine what was to be done if the right principle was to appropriate the building to those who continued to hold those religious principles, and were in communion with those who did so.

After quoting the terms of the former decision, he says:—

By this judgment it was intended that the congregation originally, if I may so represent them, were persons who adhered to the doctrines of what is known in Scotland by the name of the Associate Synod. This place for religious worship being built by the contributions of a great many persons adhering to the doctrines of the Associate Synod, if the whole body of those who now frequent the place no longer adhered to the doctrines held by the Associate Synod, then it became a question for whom at present this building should be held in trust, which was purchased by money originally subscribed by those who held the opinion of that Synod. The question then would be, Whether any of the members now desiring to have the use of this place of religious worship could be considered as entitled to the use of a building purchased by persons adhering to those religious opinions? And supposing that there is a division of religious opinions in the persons at present wishing to enjoy this building, the question then would be, Which of them adhered to the opinions of those who had built the place of worship, and which of them differed from those opinions? Those who still adhered to those religious principles being more properly to be considered as the *cestui que trusts* of those who held this place of worship in trust, than those who have departed altogether from the religious principles of those who founded this place, if I may so express it.

After saying that he could not read his own former judgment without remarking the "infinite difficulty" which the case had at that time presented, the Lord Chancellor shortly

stated what had since happened in the Court below, and closed the case with the following characteristic paragraph :—

> The Court has pronounced an interlocutor, in which it describes the utter impossibility of seeing anything like what was intelligible in the proceeding [that is, in the proceedings in the Church courts on the part of the parties concerned, and particularly of the Old-Light party, now the appellants] ; and I do not know how this House is to relieve the parties from the consequence. The Court of Session in Scotland were full as likely to know what were the principles and standards of the Associate Presbytery and Synod of Scotland as any of your lordships ; and are as well, if not better than your lordships, able to decide whether any acts done, or opinions professed, by the defenders, Jedidiah Aikman and others, were opinions and facts which were a deviation, on the part of the defenders, from the principles and standards of the Associate Presbytery and Synod. If they were obliged to qualify their finding, as they do, intimating that they doubt whether they understood the subject at all, under the words, "as far as they are capable of understanding the subject," I hope I may be permitted, without offence to you, to say that there may be some doubt whether we understand the subject, not only because the Court of Session was much more likely to understand the matter than we are, but because I have had the mortification, I know not how many times over, to endeavour myself to understand what these principles were, and whether they have or have not deviated from them ; and I have made the attempt to understand it, till I find it, at least on my part, to be quite hopeless.

Lord Eldon, it is clear, treated this case as an important and new one ; and his doctrine, that the property is held *in trust for the principles* of the Church—or, at least, of the congregation interested in it—is drawn, if not from English law rather than from Scottish, at least not expressly from the latter. On the Scottish Bench, for a considerable time, the chief, and indeed the only, exposition of the principle here laid down, was the speech of Lord Meadowbank in the first stage of the Campbeltown case (Galbraith *v.* Smith, 10th March 1837, 15 S. 808). The authority of this utterance, not disputed at the time, has since the year 1850 been denied ; but it is important, both for the history of the cases and for extracting their principle, that we should notice it. Lord Meadowbank had been counsel in

the Craigdallie case for the Synod, and a bias in this direction is discernible through his speech. At the same time, this makes his narrative of the case more interesting. He states that, after Lord Eldon's remit in 1813 to the Scottish Court, the principle of a majority, whether of congregation or contributors, was given up by the pursuers (the minister and his local adherents) who had previously urged it. He admits, on the other hand, that the other party, who adhered to the Synod, did not after that date press the Synod's authority as a defence; but he says this was not because they were forced to relinquish it by the principles laid down by the House of Lords:—

> It would have been competent for them to have shown, as matter of fact, that it having been a fundamental rule of the sect that in the supreme judicatory alone was vested the power of determining all questions of doctrine and discipline, so the judgment of the Synod was to be received as *probatio probata* of their adherence to their original principles, it being incompetent for the civil court to review the decisions in such matters of the ecclesiastical judicatories. But they were advised at once to join issue with their opponents upon the fact that there had been no apostasy on the part of the Synod, and that the tenets which it and those adhering to it professed were the original tenets of the Burgher Secession.

And he elsewhere states the following as general principles deducible from this and the other decisions:—

> First, I take it to be clearly and finally settled, that a trust may be legally established, a civil right created for behoof of a body of dissenting Christians professing certain tenets, and agreeing to have those civil rights fixed by and dependent upon the observance of such rules and regulations as are inherent in, and calculated to maintain, the principles they support.
>
> Secondly, That it is a legal object of such a trust that it may profess to be constituted with a view to perpetuity, even by placing in the hands of a recognised body the right and power of controlling and modifying those rules and regulations, in conformity with the fundamental principles of that sect of dissenting Christians to which those constituting the trust may have professed to adhere, and that the civil court will not take cognisance of the proceedings and determinations of those ecclesiastical judicatories, as they may be termed, upon matters

of doctrine and discipline, but hold them to be *probatio probata* of the principles of the sect.

Thirdly, That the original deed or other instrument by which the trust is created need not, in order to be effectual, specify within itself the particular conditions of its creation, but that these objects may be ascertained, in order to their recognition and enforcement by courts of law, by facts and circumstances, and by a train of proceedings indicative of the purposes and the views of the parties.

Fourthly, That in order to confer upon a party the right of enforcing the objects of the trust, it is only essential that he should possess a *persona standi in judicio*, and qualify an interest to have it enforced. But it is not required (and that is the point which, though now settled, was originally doubted) that in those cases where the parties contributing their money and their means to the constitution of such a trust, and forming a congregation of dissenting Christians, shall have differed in opinion, and both claim possession of the trust-estate, the success of either will depend, not upon the greater amount which each may have contributed in the creation of the subject, or on their numerical superiority, but on their adherence to the original principles which it was their professed object to maintain in the constitution of the trust.

It will be observed that in the first of these quotations Lord Meadowbank holds, as matter of fact, that the judgment of the Associate Synod was intended, according to the trust in question, to be conclusive as to adherence to its principles; in the second he merely claims that it is possible to construct a trust in which this shall be the case. In his latter or general proposition, too, he qualifies the power of the supposed Synod by a proviso that their judgments shall be "in conformity with the fundamental principles" of the sect, without however qualifying in the same way, as seems to be logically necessary, his conclusion as to their judgments being *probatio probata.*

In his important speech in the Kirkintilloch case in 1850,[1] the Lord Justice-Clerk Hope held that the principle of judgment of the House of Lords had been "wholly misunderstood" by Lord Meadowbank in the speech just quoted from. And he puts his finger on the worst error in the following sentence: Lord Meadowbank's view "takes

[1] Craigie *v.* Marshall, 25th January 1850, 12 Dunlop, 523.

adherence to the Synod as *conclusive*, and *excludes* inquiry into the original opinions or doctrines, if opposed to the declaration made by the Synod as to what these doctrines are, and is precisely the error in the Craigdallie case again brought out, and in more absolute terms." Lord Meadowbank's doctrine of *probatio probata* may be held to be the point emphatically repudiated by the Court on this occasion, and at least once since. Whatever weight may be attached to the fact of Presbyterian or Church subordination, it is not to be *assumed* as conclusive. That, at least, is settled by the case of Craigdallie. All are agreed that the Craigdallie principle is, that the property follows not the central judicatories, but the original principles of the congregation. And to Lord Meadowbank's rejoinder, "But submission to the judicatories may be one of these original principles," the answer of most of his successors on the Bench is, "*Then you must prove that.* It is not *probatio probata.* It is not even a presumption of law. The presumption is the other way."

But does not the Craigdallie principle, as expounded in the Kirkintilloch and more recent decisions, go farther than this? Does it not *exclude* the consideration of submission to the judicatories in every case, and throw us back on the tenets of the congregation alone? It may often appear so, as when Lord Eldon in his second judgment says that the question is, "Which of the parties adhered to the *opinions* of those who had built the place of worship?"[1] using the word opinions instead of the "principles and persuasions" of his remit; or, still more strongly, when he remarks, in the case of Folgin *v.* Wontner, "I take it to be now settled by a case in the House of Lords, on appeal from Scotland, that the chapel must remain devoted to the *doctrines* originally agreed upon;"[2] or where the Lord Justice-Clerk Hope says, "The truth is, that if the original principles of the congregation are established, adherence to them and not to the Synod is the rule fixed by the case of Craig-

[1] 2 Bligh, 541. [2] 2 Jacob and Walker, 247.

dallie; so that separation from the Synod is really in that case *immaterial*." But that such a conclusion would be unfair, is manifest not only from the repeated statements above quoted, to the effect that submission to the judicatories, though not a conclusive element, is *one* element,—one that needs indeed to be proved, but may be proved to be even *the* condition of the trust,—but by the express statement of Lord Chancellor Eldon already quoted, "If it can be made out that this society originally said this, We will contribute our money for the purposes of building a meeting-house, and we will place ourselves under the jurisdiction of the Associate Synod, and we agree that the Associate Synod shall direct the application of this place so built—that is matter of law, and the contract will apply to the law." It is plainly held that there *may* be such a subordination to Church judicatures as shall override many, possibly all, of the other principles of the congregation. It is conceivable that submission to a superior and central authority may be the one religious principle of a Church. There are Churches of colossal pretensions of whose principles this would be a plausible representation. It is at least conceivable that such a submission may exist within certain limits, so that the individual, or the congregation, becomes subject to a *potestas dogmatica*. It is a possible thing that, in the words of Lord Meadowbank, a trust may profess "to place in the hands of a recognised body the right and power of controlling and modifying its rules and regulations in conformity with the fundamental principles of the sect." A General Assembly, with certain restrictions and precautions, may have the acknowledged right to modify for the better both the common practice and the common creed of its members. It may have the power, and even the duty, to alter its Confession of Faith, and may have this as one of its fundamental principles.

But that it has must be made out to the satisfaction of the Court. And in none of the earlier cases which occurred

in Scotland after the Campbeltown case in 1837 was this broadly claimed or seriously attempted.

But the Campbeltown case, in its second stage, brought up this matter in a still more important way, which must now be noticed. For it is obvious that this matter of submission to a dogmatic power in the judicatories is only one form or one part of a much larger question—the question whether there is a right of dogmatic change or deviation in the Church at all. If the Church generally—the whole body, with its judicatories — has no right to modify or change its doctrines, the duty of adherence to it on the part of the congregation cannot relieve the latter from its own supposed original immobility of doctrine. If, on the other hand, there is a right claimed by the Church or sect, and therefore allowed by the Court, to modify some of its opinions, such a liberty may probably be shown to have been part of the original principles of the congregation itself. In neither case does it appear so necessary as might be supposed from this case of Campbeltown, to go round to the judicatories for an authoritative judgment which cannot be questioned by the Court and will protect the congregation. Every such judgment, even of the highest dissenting judicatory, can be questioned in Court at least to the extent of determining, with a view to civil interests, whether it be competent. The real question will be, whether the Church as a whole claims and has a power of deviation; and what are the things fundamental to it from which it cannot deviate. The question of how closely the congregation is bound to it will follow upon this; and it is quite conceivable that, while submission to the judicatories on some other points—such as discipline or the form of worship—may be easily proved, it may be difficult or impossible to show that the congregation is bound to follow the Church into a change of doctrine quite competent to the Church itself. Yet, generally, the limit of competency for the Church will be the measure of competency for the congregation.

Besides, it must not be forgotten that, on the one hand, there are in all Christian countries many congregations which hold their native independence, and are their own judicatories. So, on the other hand, the question may arise about the property held for a whole Church as well as for a congregation merely. In either of these cases (the former of which, strangely enough, has not yet come into Court in Scotland [1]) the question of power of deviation arises quite simply, uncomplicated by any question of subordination.

But until recently this right of doctrinal deviation has scarcely been at all pleaded to the courts of Scotland. The Campbeltown case, indeed, in its second stage, is the only one in the first half of the nineteenth century where it distinctly came out; and on this occasion, while the judges held that it was a point of much importance, the parties declined to take advantage of it. The first judgment in this case, in 1837,[2] was on the question of interdict or interim possession, and the opinions delivered had reference to the connection of the congregation with the judicatories. But in the second judgment, in 1839,[3] the Court had to decide on the merits of the case, and it is in some respects the most important judgment of this kind which has been delivered. Lord Moncreiff, who was Ordinary (and whose connection with the dominant party in the Establishment during the Voluntary controversy, as well as during the controversy on the Veto Act, introduced on his advice, adds on such a point to the value which his judicial eminence gives to his decisions generally), stated the general question as to limits of deviation as follows:—

> But the defenders maintain another point, which, if well founded, may carry them through the case, even though they should fail in everything else. Supposing that the Relief Church did originally hold the scriptural lawfulness of the Church Establishment, and that the

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[1] That is, in respect of doctrine. As to money, see the congregational case of Connell *v.* Ferguson, March 6, 1861; 23 D. 683.

[2] 15 S. 806, March 10, 1837. Alternate church services allowed.

[3] Smith *v.* Galbraith, 14 Fac. Coll. 979, June 6, 1839; also 5 D. 665.

Court should be satisfied that the Presbytery and Synod have now rejected that principle, and adopted the reverse proposition, the defenders still maintain that that is *not an essential point* of doctrine, or of opinion, sufficient, in a question among the present parties, to justify an abandonment of the Relief Presbytery and Synod, or to entitle a minority of the proprietors to carry off the property from the majority adhering to those bodies. The Lord Ordinary considers this to be the most important, and perhaps the most difficult, point in the cause. It might bring it near to the ultimate state of the case of Aikman (Craigdallie case). For although, on the assumption that the difference between the Synod and the defenders adhering to it and Mr Smith, and the other pursuers adhering to *him*, may be quite clear and intelligible, it yet may not be sufficient, in point of vital importance, to warrant the Court to find that the property must devolve on a small minority of the proprietors seceding from the Relief body. It cannot be held that every article of the Confession of Faith is a *necessary article of communion.* Private Christians are under no obligation, even in the Established Church, to sign the Confession of Faith, though admitted into full communion; and the defenders may reasonably maintain that there may be minor points involved in it, not entering into any of the essential doctrines of Christianity; a difference of opinion on which will not warrant a separation to carry with it rights of property, contrary to the destination for a church in connection with the Relief Presbytery.

When Lord Moncreiff at a later stage made avizandum with the case to the Court,[1] he intimated that his own leaning was to hold it proved both that the Relief body originally held the lawfulness of Church establishments, and that they now held their unlawfulness. This finding in point of fact, would of course raise the general question above indicated, whether the doctrine was fundamental. And the Lord Ordinary had "to regret that the defenders have scarcely dealt with the difficulty," and that "from an evident unwillingness to meet the question on the assumption of the facts" which raised it. But though the Church defending, with characteristic Scottish love of consistency, declined to argue on the assumption that there had been any change of tenets, the influence of the idea suggested by Lord Moncreiff is very visible in the opinions of the Bench. The chief ground on which the Second

[1] His note here is reported only in the Faculty Collection, xiv. 992.

Division assoilzied the defenders was doubtless, as stated in the rubric of the Faculty Collection, "that there was no sufficient proof that the principle alleged to be departed from"—that is, the principle of establishments, or rather of State endowments—"had been inherent in the original constitution of the Relief body." But the judges seem rather to have thought with Lord Moncreiff that this tenet had been held by that body in point of fact, whether it formed part of its *constitution* or not. The Lord Justice-Clerk Boyle says: "It appears to me that there is a failure of such proof, as it can only be inferred from the original members having adopted the Westminster Confession, but which, it may fairly be held, was adhered to merely as their creed in regard to doctrine and discipline, and not as an essential criterion of their sect."[1] No doubt his lordship holds, also, the very important position that in the Confession there is "not one word with regard to an obligation on the civil magistrate either to maintain or endow the Church," and Lord Medwyn agrees with him on this point. But on the more general question Lord Medwyn also says:—

> The view I take is, that although, as I think, the Relief Synod do hold the Voluntary principle to be the scriptural one, and the Church of Scotland holds the Endowment principle, it is not an article of faith as affecting the Relief Church to which such effect is to be given, as is here sought, by transferring the property of the Church from the great majority, and these adhering to the Relief Synod, to a small minority who dissent from the Synod. It is not every opinion held by the Church of Scotland at the time the Westminster Confession was adopted, a departure from which will warrant the pursuers to insist that, if they retain the same opinions, they are entitled to the exclusive property of this church.

We find Lord Meadowbank seemingly occupying the same twofold position, arguing, on the one hand, that there is no evidence that it was a fundamental principle of the Church

[1] 5 D. 679. In Fac. Coll.: "They adopted it as to religious doctrine and discipline only, but not as to other matters."

of Scotland itself that it should be endowed; but holding still more decidedly that, even if that Church had in its Confession a reference to endowments, it would be a question whether the Relief body, in abandoning this, had abandoned any "principle of faith, any religious principle." [1] The judgment delivered by the Inner House in this case is not at first sight a very vigorous or satisfactory one; [2] and the opinions give one the feeling that the judges, as Lord Moncreiff hints, were giving the Relief Church the benefit of a right to change its doctrine which that Church had not itself claimed. Yet a principle so far-reaching is not of less importance that it originated with the administrators of law. And the opinion in the same direction, even of Lord Moncreiff, who both in this and subsequent judgments leans to the side of orthodoxy, is quite distinct: "The Lord Ordinary cannot go so far as to hold with the pursuers, that everything whatever which is laid down doctrinally in a Confession of Faith must be held to be *de essentialibus*, the least departure from which will affect the use of the property." [3]

This right of doctrinal or confessional deviation has been claimed and exercised by the great majority of the Presbyterian family of Churches throughout the world. And this has come out far more visibly since the date when the Campbeltown case was decided in 1839. Yet the principle, so important for the just working out of Lord Eldon's rule of the "original trust," assumed little promi-

[1] Faculty Collection Report. In the other Report his lordship says he had tried to discover what deviations from their original professions had been made by the judicatories, "and if any, whether it has been of that character and description which essentially changed the character of the tenets and faith originally professed;" for any "abandonment of the faith professed by the founders" would leave the property to those adhering to it.

[2] The difficulty is increased by the fact that the Report in the Faculty Collection is the only one published at the time. The other in the authorised Report did not appear till 1843, and varies from the former considerably—not always to the advantage of the learned speaker, who edited his views in a legal crisis.

[3] Note on making avizandum with the case, Fac. Coll. xiv. 993.

nence for some time in our courts of law — at least in Presbyterian cases. The two first cases of property after it, the Kirkintilloch case in 1850 and that of Thurso in 1859, were both cases in which, as Lord Meadowbank put it, it probably "might have been competent" to plead a power of deviation inherent in the Church, and forming a condition of the trust; but in both the parties were desirous, or "were advised at once to join issue" on the question whether there had been any such deviation or not. The intense conservatism of the Scottish character, and the infinite respect which it has had for creed, have produced a startling contrast between the cases decided in England since Lord Eldon's time, and those which during the same period have emerged here. In the former country, questions have occurred between parties separated from each other by great theological gulfs, generally Calvinistic Presbyterians on the one side and Unitarians or Socinians on the other. Yet in these cases, strange to say, the most earnest and powerful appeals have been made to the Court, on the ground of the essential freedom of a Church to change its doctrines, and of this having been one of the principles of the body whose right to its property was imperilled by its having traversed the whole diameter of opinion. In Scotland the cases have been remarkably otherwise. They have not been between Trinitarians and Socinians, or between Romanists and Protestants. They have not even been between Episcopalians and Presbyterians, Baptists and Pædobaptists, Calvinists and Arminians, or any of the other well-known and important divisions of Christian fellowship. They have been generally between Calvinistic Presbyterians, who were proud to belong to the same historic school; and their historic pride sometimes tempted them to forget their principle of a right from time to time to revise or exchange "subordinate standards." This contrast between the English and Scottish cases in point of fact, was early noticed on the Bench as making room for an important difference in the application of the prin-

ciple;[1] but for a generation later the general question was not again effectually raised by litigants, and it was at first willingly escaped from by the Court.

The Campbeltown case was thus for some time the highest reach of our law in this whole region. It raises, it will be observed, the legislative power of the Church as to doctrine. But it occurred in the very middle of the keen controversy between the Court and the Assembly of the Established Church—a controversy which latterly concentrated itself on the other point of jurisdiction. That other point accordingly retained after 1843 a somewhat exaggerated importance, with lawyers as well as churchmen. And partly for this reason, the earlier cases which we are about to follow, down to 1867, when the House of Lords again intervened, had legal results admitted on all hands to be rather unsatisfactory. But steps which are inchoate and tentative may be for that very reason interesting to trace, and before the next period terminates we shall find the Church right of legislation again recognised, and that in the highest Court of Appeal.

[1] Lord Moncreiff, in the first of his notes in the Campbeltown case, already quoted from, says: "The Lord Ordinary attaches the more importance to this point, because, if it cannot be made out that the tenet concerning the lawfulness of a Church Establishment is *de essentialibus* in such a Church as the seceding Voluntary Church of Relief, the force of the decisions on the English and Irish cases would be entirely taken off, and the pressing difficulty in the argument, when the supposition of the Synod having become Unitarian or Roman Catholic is made, would be almost entirely overcome. The Lord Ordinary therefore directs the special attention of both parties to this point, which he thinks by far the strongest point of the defence. He does not mean to say that there *may* not be a solid answer to it. But he states the difficulty strongly, in order that the pursuers may see the necessity of meeting it with care, understanding distinctly the view to be, that there *may* be points even of religious principle, a difference on which will not warrant a separation in the question of property." 5 D. 673.

CHAPTER II.

1843 TO 1867.

FOR the first time the law of Scotland found itself after 1843 confronted, in the Churches outside establishment, with a problem of imposing dimensions. The new Free Church laid plans at once to be represented by a manse and church in every parish in Scotland; and its great financial novelty of a yearly Sustentation Fund, with an equal dividend to each incumbent, drew the inquiring eyes of Christendom. Yet this was only part of a manifold effort of adaptation to freedom, carried on under great suffering and sacrifice, but with an enthusiasm so impressive to outsiders that the whole was long after compared, by a Prime Minister addressing the House of Commons, to "the launch of some goodly ship, which, constructed upon the shore, makes, indeed, a great transition when it passes into the waters, but yet makes the transition without loss of its equilibrium, and when it arrives at that receptacle, glides on its bosom calmly and even majestically."[1] Even more important, however, in some aspects was the new movement for the incorporation of the *Secession* and *Relief* into the one UNITED PRESBYTERIAN CHURCH; for this great event, consummated in 1847, marked the highest wave for the next fifty years of that persistent flood of reunion of

[1] For the "moral attitude" of the Free Church of Scotland in 1843, Mr Gladstone added, "Scarcely any word weaker or lower than that of majesty would, according to the spirit of historical criticism, be justly applicable." 31st May 1869. *Hansard.*

Presbyterianism in Scotland which was to illustrate the century. The two Churches had been divided by what in a sense (as being a Church and State rather than a Church question) was a foreign and alien obstacle. But it was one which had been rashly imported into the creed, or at least the "testimony," of the bodies themselves, and it had now to be finally rolled away.

The two Churches indeed, Free and United Presbyterian alike, starting on a new career at almost the same date, had each to adjust its relation to its creed. Each did it characteristically. The Free Church claimed freedom broadly in theory. It was in this very year 1847 that its Assembly approved the Free Church Catechism which it had in preparation since 1843. Among the "distinctive principles" of the new body as there put there was, as we have seen,[1] the statement that Christ's Headship is "violated when a Church is tied to its Confession by civil enactments." The Church's endowments or civil privileges, it was explained, may quite conceivably be so tied even by statutes. But it is another thing to concede that the Church itself "is bound always to go absolutely upon the supposition of its soundness, and to interpret the Word of God agreeably to its declarations." That would be to make "the supreme and ultimate standard of doctrine not the Bible but the Confession of Faith," and to strike a blow at the corporate conscience. But while thus publishing its right[2] to revise and expurgate its Creed, the Free Church avoided exercising that

[1] P. 86.

[2] In 1866 Dr William Wilson, one of the most cautious and conservative of the fathers of the Free Church, put it thus from the Moderator's chair: "There are two things implied, which we must be careful never to lose sight of,—

"1. That the Church finds the Confession to be in accordance with her present beliefs, to be an adequate expression of her present attainments in divine knowledge. No Confession of Faith can ever be regarded by the Church as a final and permanent document. She must always vindicate her right to revise, to purge, to add to it. We claim no infallibility for it, or for ourselves who declare our belief in the propositions which it contains. We lie open always to the teaching of the Divine Spirit, nay, we believe in the progressive advancement of the Church into

right in the meantime to any extent. Even on the matter of the civil magistrate and his intolerance, it contented itself with saying (Act of Assembly 1846, Sess. 24) that the Free Church of Scotland "disclaims intolerant or persecuting principles," and adding that "she does not regard her confession of faith, or any portion thereof, when fairly interpreted, as favouring intolerance or persecution, or consider that her office-bearers, by subscribing it, profess any principles inconsistent with liberty of conscience and the right of private judgment." The subscription of the ministers and

a more perfect knowledge of the truth. It is the Word of God only which abideth for ever. In the Bible we have a complete revelation, but we are slow of heart to apprehend all that God has taught us there, and the experiences and errors of the past, as well as the better materials now provided for an intelligent investigation of Scripture truth, may possibly advance the Church and the world to such a position, that a protest against some exploded errors may no longer be necessary, and a fuller statement of some truth may be desirable. It is open to the Church at any time to say, We have obtained clearer light on one or other or all of the propositions contained in this Confession, we must review it; the time has come for us to frame a new bond of union with each other, a new testimony to the world. If this freedom do not belong to us, then indeed we are in bondage to our Confession, and renounce the liberty wherewith Christ has made us free. I speak thus in vindication of a great principle, and not at all in sympathy with those who profess already to have found that the Confession of Faith is not an adequate or true representation of the truth which they find in the Word of God. It is not by vague allegations to that effect that the Church is to be moved from her position, but by a demonstration from the Scriptures that we have misapprehended and misstated some truth which our Confession declares to be in the Bible, and which is not to be found there.

"But, 2nd, It is implied in all that I have been stating, that we are not at liberty to hold forth a Confession which we do not believe. For in such a case the Church is absolutely without a Confession. A Confession which is not a confession of our faith can serve none of the purposes for which such a document is designed. It can neither certify to the world what truth the Church teaches, and holds to be divine, nor does it indicate on what terms the office-bearers of the Church are associated. It ceases to be either a bond of union or a public testimony. It is lawful for the Church to revise her Confession, and adjust it to her present attainments and inquiries; it is lawful for her altogether to abolish or dispense with a Confession, if, indeed, without one any compacted organisation were possible; but to retain a Confession which has ceased to be believed can never be lawful."

office-bearers of the new Church, however, was by the same Act altered "in consequence of the late change in the outward condition of the Church." Some antiquated heresies were omitted from the list previously repudiated; and as to the documents of 1843 (the Claim of 1842 and the Protest of 1843), the functionaries of the new Church were henceforth to be taken bound to approve, not of those documents, or of all their parts, but "of the general principles embodied in them, as declaring the views which are sanctioned by the Word of God and the standards of this Church, with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her *only* standard."[1] The United Presbyterian Church had still more important changes to make, and it announced them in a formal Basis of Union.[2] On the preamble, that the Word of God is the *only* rule of faith and practice, it declared that not the Confession only, but also the Larger and Shorter Catechisms of Westminster, which are "the confession and catechisms of this Church," do together "contain the authorised exhibition of the sense in which we understand the Holy Scriptures,"—thus avoiding the somewhat ambiguous term "standards," while skilfully expressing the Protestant function of a Church's creed. But they add at once, that "we do not approve of anything in these documents which teaches, *or* may be supposed to teach, compulsory or persecuting and intolerant principles in religion." And by another article "this Church asserts the obligation and the privilege of its members, influenced by regard to the authority of Christ, to support and extend, by voluntary contribution, the ordinances of the Gospel."

Such was the attitude in which the non-established Presbyterianism of Scotland set itself to face the problems—and among others the legal problems—of the remaining half-century. But the first case in which there was something like collision between the Church view and the legal view

[1] For the Act and its Formula, see Appendix B.

[2] For Basis, see Appendix C.

was outside Presbyterianism—it turned upon a sentence by a bishop of the Scottish Episcopal Church. That Church, like the others, was at this time passing through a period of change, if not absolute new-birth. The adoption of the new Code of Canons, indeed, accompanied by the acceptance of its present name of THE EPISCOPAL CHURCH IN SCOTLAND, and followed by a celebrated litigation, did not take place till towards the close of the period with which we now deal. But it was in 1845 that Mr Gladstone, in his letter to the Primus in favour of the representation of the laity,[1] announced his view that the Church, in Scotland if not throughout the world, should now gladly hail its separation from the State. And the case which soon arose in our courts originated in the contrast between the rather High Church attitude of that Scottish Church itself, and the Protestant views of certain "Church of England" congregations scattered throughout Scotland, which were being gradually brought into connection with the Scottish Episcopate. It arose, accordingly, in very special circumstances. An Aberdeen congregation, originally independent of that body, had entered into a deed of "voluntary union" with it, and their clergyman, the Rev. Sir William Dunbar, had submitted to the spiritual jurisdiction of the bishop. Quarrels arose; the clergyman withdrew from the contract to which he had submitted, and being thereupon publicly deposed by the bishop, raised an action of damages for defamation,[2] to which the first defence was of course the spiritual jurisdiction of his diocesan. All the judges remarked on the peculiarity of the circumstances, as not raising the ordinary case of an ecclesiastical superior and inferior; but they rather went out of their way to declare (against the bishop) what the principle of law should be not only in exceptional but in all other cases. "There exists in Scotland no Episcopal Church whatever," said Lord President Boyle, "except as a distinct

[1] Letter to the Primus of the Scottish Episcopal Church, by W. E. Gladstone, 1845.

[2] Sir W. Dunbar *v.* Skinner, 3rd March 1849, 11 D. 945.

sect, fully recognised and protected under the Toleration Act." And such a body, being constituted by agreement or contract, has, properly speaking, no jurisdiction—none at least that can be recognised by a court of law. "Jurisdiction," said Lord Fullerton, "necessarily implies the existence of a power conferred by the State, and vested in functionaries sanctioned for that purpose by the State. . . . In regard to the Protestant Episcopal Church of Scotland, it appears to me that this Court, administering the laws of the realm, can recognise no jurisdiction whatever as existing in any official of that communion. They enjoy, it is true, toleration, but merely as a body of private individuals united by particular religious views, and associated for the laudable purpose of promoting those views." Yet on the question how far the contract may simulate jurisdiction, or may confer a voluntary authority equivalent to jurisdiction, the views of this great judge were so guardedly expressed as very much to foreshadow the course which the law, after much subsequent contest, seems likely to take:—

> There is no doubt that all parties entering into an association for purposes not prohibited by law, may effectually bind themselves to submit without appeal to the determination of certain matters, and even to the infliction of certain censures, by the official authorities to whom such power is committed by the terms of the association; and if it could be instantly shown that, by the admitted or proved circumstances of this case, the defender had absolutely bound himself to submit to such a sentence as that for which he now seeks redress, the defence in the second plea in law might have been sustained, and the case sent out of Court.[1]

This matter of jurisdiction was to receive more careful consideration ere long in an important Presbyterian case. But before it came up again, the Court was called upon to return to the other question of *Presbyterian union in relation to Church property*, on the lines laid down by the House of Lords and Lord Eldon in 1813, and last dealt with in the Campbeltown case in 1839. It may be matter of surprise that great Churches, when reconstituting them-

[1] 11 D. 962.

selves in the deliberate way which we have described, should not have made provision by deed (as other important societies, and even private testators and entailers, do) for equitable settlement of their real property in view of all the contingencies of the future. But in point of fact they did do so, and the cases which presently came before the courts were stray exceptions to the now generally adopted ecclesiastical rule. What the general rules of the TRUST-DEEDS of the great Presbyterian Churches are—what these bodies have thus from the beginning thought to be equitable in cases of union and division—is in the highest degree instructive. And this is the proper place to record it.

1. The Free Church, commencing with a clean slate, was more able than the others to inscribe upon it its own ideas of justice. It had difficulties at first. The privileges of establishment had been forfeited by it, partly because it insisted on the freedom of the Church to incorporate with itself the two or three hundred new churches raised by Dr Chalmers. But these new churches (by a peculiarly hard, though perhaps technically just, decision [1] soon after the Disruption) were taken from it, and swept under the authority which they were built to escape. Then in several of the counties the great landholders refused to sell sites [2] for the homeless congregations. But long before these difficulties were ended, the Assembly appointed a powerful committee to prepare a model deed which should be the one form for all churches and manses throughout Scotland. It was unanimously approved on their report, and has now been acted on for half a century. Three years after it was drawn it seems to have been alluded to on the Bench by the Lord Justice-Clerk Hope; and the extreme views thrown out by that judge against any Church union in Scotland make it desirable to inquire whether the

[1] Bain *v.* Black, 1846, 11 D. 1286, and 6 Bell's Ap. 317.

[2] One such case clung to Carlyle's memory. See Froude's Life, iii. 322.

original attitude of the Free Church deed on that question was doubtful. The answer is overwhelming. It would be understating the case to say that union with other Churches is recognised in it as a thing lawful or very desirable or (when the time comes) imperative. The fact is, that by the first trust-clause of the deed the congregational property throughout Scotland is to be held for "a congregation of the said body of Christians called the Free Church of Scotland, *or of any united body of Christians* composed of them and of such other body or bodies of Christians as the said Free Church of Scotland may, at any time hereafter, associate with themselves, under the foresaid name of the Free Church of Scotland, *or under whatever name or designation they may assume.*" It must be remembered that the leading man in the committee which framed a deed with so central a provision was Mr Murray Dunlop, who had also been the legal author of the "Claim of Right" and "Protest" of 1843; and he lived long enough to advise the General Assembly to carry it out by forming a "united body" with at least one other Church. The Free Church, therefore, even in the moment of disruption, pledged itself to future reconstruction and union. But it carried out the details of its deed in its own way—which, as compared with that of other Presbyterians, was rather centralised and bureaucratic. For the deed goes on to provide that the congregational worship is to be regulated by the usages of the "body;" that such persons only shall minister in it as the said body shall appoint by its courts;[1] that deposition or suspension by

[1] We have quoted in the text the first trust-clause or "purpose" of the deed. The second is as follows:—

"Upon trust, that the said trustees or trustee acting for the time, shall at all times, and from time to time, hereafter permit and suffer to preach and expound the Holy Scriptures, and administer ordinances, and perform the usual acts of religious worship within the said building or place of worship, erected or to be erected, as said is, such person or persons, and such person or persons only, as may or shall from time to time be authorised or appointed so to do, by the said body, or united body of Christians, acting through the medium of its kirk-sessions, presbyteries, provincial synods, and General Assem-

the said courts shall bar the minister from farther officiating; that no one can sue the trustees for any use of the building without the consent of the Assembly and certificate of its Moderator; that the trustees may always sue, and that no one may defend except with consent and certificate foresaid; but that the trustees themselves are to be subject, in both management and disposal of the building, to the General Assembly for the time being, whose officers have right to pursue for its interest, and certified copies of whose Acts are to be binding upon all parties. The trustees are appointed and kept up by the congregation; and each trustee and each minister and member of the congregation must be in full communion with the Church.

These centralising regulations might suffice for the management of the Church in ordinary times. But experience had shown that it was necessary to provide for

blies, or according to the form, or forms, in use with the said body, or united body, for the time: providing always, as it is hereby expressly provided and declared, that no person or persons, even holding such authority and appointment as aforesaid, nor any person or persons whatsoever, shall have any right or title to pursue the said trustees or trustee, acting under these presents for the time, in any court of law or justice, for the purpose, or with the object and intent, either of obtaining such permission and sufferance as said is, or the continuance thereof, or of obtaining, in any manner of way whatever, liberty or the continuance of liberty to preach and expound the Holy Scriptures, or administer ordinances, or to do or perform any act of religious worship, or other act or thing whatsoever, within the said building or place of worship, erected or to be erected, as said is, or with the object and intent of in any way controlling the said trustees or trustee in reference to the use, occupation, management, or disposal of such building or place of worship, unless with the express consent and concurrence of the General Assembly of the said body or united body of Christians, or of the Commission of such Assembly, previously had, to such pursuit; of which consent and concurrence the only legal or admissible evidence shall be a written certificate, under the hand of the moderator and clerk of the General Assembly of the said body or united body of Christians, or of their then immediately preceding General Assembly, or under the hand of the parties generally known or understood to hold those offices for the time being; which written certificate shall be produced along with the summons or other proceeding commencing such pursuit, otherwise the same shall be utterly incompetent, void, and null, albeit such certificate really may exist: declaring, as it is hereby

possible divisions of opinion and for separations—separations which might be caused by the very unions which were looked forward to by the deed. Accordingly there follows the important provision that if at any future time *a third* of the whole ministers of the Free Church should separate in a body, declaring that they hold "the principles of the Protest of 18th May 1843," and are "carrying out the objects of the said Protest *more faithfully*" than those who remain, and shall form a separate body with presbyteries and General Assembly,—in such a case each congregation in Scotland shall be at liberty to choose which of the two they will adhere to, and the majority of the congregation shall take the church with them if they choose to join the protesters, paying, however, in that case, to the minority adhering to the larger body a proportional share of the value of the property.

expressly provided and declared, that in the event of any person or persons, even holding such authority or appointment as aforesaid, or any person or persons whatsoever, pursuing the said trustees or trustee as aforesaid, unless with such express consent and concurrence as aforesaid, previously had to such pursuit, as said is, evidenced as aforesaid, such person or persons shall, immediately on such pursuit being commenced, *ipso facto*, forfeit and lose all and every right, title, and interest, and claim and demand, of whatever description, under these presents, and shall from thenceforward cease to have any concern therewith, or interest therein: and providing further, as it is hereby further expressly provided and declared, that whensoever any person holding such authority or appointment as said is, and enjoying the permission and sufferance foresaid, shall, by a sentence of the said body or united body of Christians, pronounced by one or other of its presbyteries, provincial synods, or by its General Assembly, or Commission of such Assembly, for the time being, or in any other way or manner in use in such matters, for the time, by the said body or united body of Christians, be deposed or suspended from office, or cut off from the said body or united body of Christians, or declared no longer a minister thereof, his authority and appointment foresaid shall, *ipso facto*, cease and determine; and the said trustees or trustee, acting for the time, shall not only be no longer bound, but be no longer entitled, to permit or suffer him to preach and expound the Holy Scriptures, or administer ordinances, or do or perform any act of religious worship, or other act or thing whatsoever, within the said building or place of worship, erected or to be erected, as said is; and shall be bound and obliged to debar him therefrom, ay and so long as he remain deposed or suspended or cut off."

The careful equity of this clause is not the only thing in it of value for the law. It suggests a principle—of the recognition of minorities as such—which may yet have to be given effect to in Presbyterian matters. Law has always a difficulty in dealing with the identity of Churches after unions. But the leading clause in this deed had already given effect to the principle, that a Church with a fundamental obligation to union maintains rather than loses its identity when it carries out that obligation. And now this clause suggests the counter-question, whether a conscientious minority, insisting either on going into such a union or on staying out of it (in both cases against the mass of members), should be held by the law to lose all its civil rights, or should not rather retain them *pro tanto* as *part* of the general body.

2. The United Presbyterian Church had not a mass of new churches for which a new title was necessary. On the contrary, it was formed in 1847 out of congregations each with a tenure or title of some sort. In many cases, however, the title was precarious and inadequate; and some of the more important were drawn in the early days when a trust for a dissenting Presbyterian body (if not also for a congregation) was supposed to be illegal. It was equally necessary, therefore, for this Church to consider the best solution of the problem of equity. But it was a good deal more difficult; and it was not till the year 1858 that the Synod issued a paper of "General Directions for the Guidance of Congregations in regard to Title-Deeds." It gives *two* model trust-deeds, either of which forms, this body was advised, "would so regulate the rights of property as in *most cases* to exclude the necessity of any appeal to the courts of law. The object of these conditions is to substitute the ascertainment of *numbers* in cases of division, whether in the congregation or Church at large, for and instead of an inquiry into and ascertainment of *principles and doctrines*." Of these two forms one may be shortly

described as more a trust for the congregation; the other as rather like that of the Free Church, which is a trust for the congregation in its connection with the governing body. The former style provided that the majority of the congregation are to have the property, "whatever may be the religious principles they may adopt, or the denomination with which they connect themselves." The latter tied it to the majority of the Synod "in case of any split or division taking place in it, whereby the members composing the said Synod may be separated into two or more parties, or in the event of the said Synod uniting, or resolving to unite, with any other religious judicatory or denomination." In both cases the general intention of the forms was obviously the same with that of the Free Church deed, and it was described as being a desire to render unnecessary "the difficult, and to the courts of law uncongenial, task of considering systems of doctrine or rules of Church government." The proposal of an alternative deed is instructive, as showing the variety of administration welcomed not merely in the Presbyterian family, but within one of its Scottish members. But as years went on, the sentiment of the United Presbyterian Church (a Church more sporadic in its origins, and therefore more congregational in its traditions and feelings, than are some others) became more in favour of expressing union in its congregational deeds. And in 1892 *one* form of trust-deed was revised and issued; and the Synod now recommended that the heritable properties now or hereafter belonging to its congregations should be held by their trustees for the purposes, and with the duties, powers, and privileges, which are there expressed. To avoid coming back to the subject, I anticipate this later legislation, and give here in a note [1]

[1] The first purpose of the United Presbyterian trust-deed is as follows:—

"The trust subjects shall be held in trust for the use and behoof of the congregation; and in case of any split or division taking place in the Synod of the United Presbyterian Church whereby the members composing the said Synod may be separated into two or more bodies, or in the event of the said Synod

the main purposes of this trust-deed, as has been done with that of the Free Church. It will not be forgotten, however, that the United Presbyterian trust, though recommended to all congregations, has been only partially adopted, while the Free Church deed of 1844 covers, with very few exceptions, its congregational property.

But in the year 1850 it was easy to find congregational titles outside these trust-deeds, and with no provision for union or severance. One of these was that of the Church

uniting or resolving to unite with any other religious judicatory or denomination, the trust subjects shall be held in trust for the use and behoof of those members of the congregation, male and female, who shall adhere to and remain in connection with the body composed of those who adhere to the majority of the ministers and ruling elders who voted on the occasion of such division; or with the body composed of those who adhere to the Synod in the event of there being no division, or to the majority of the Synod in the event of there being a division, along with the ministers and ruling elders and members of any other body with which they may unite, as the case may be; and shall be held subject to the Synod or Assembly representing such body or bodies, to the exclusion of all other members or persons, so long as such members as shall adhere and remain as aforesaid shall be recognised as a congregation by the Presbytery of the bounds; and in case the members of the said congregation, or those adhering to and remaining in connection with the United Presbyterian Church, or the body or bodies hereinbefore described as aforesaid, and subject to the Synod or Assembly representing the same, shall, with any who may join them, be so few as not to be recognised as a congregation by the Presbytery of the bounds, or in case the whole members of the said congregation shall separate from and renounce their connection with the United Presbyterian Church, or the body or bodies hereinbefore described, either of which cases shall be conclusively proved by an order of the presbytery of the bounds to drop the name of the said congregation from the roll of the presbytery, the trust subjects shall be held for behoof of the Synod or Assembly forming the Supreme Court for the time of the United Presbyterian Church, or of the body or bodies hereinbefore described, as the case may be; and shall be dealt with and sold or otherwise disposed of or used, and the proceeds used or applied, all as such Synod, Assembly, or Supreme Court shall direct or authorise: and in case of any split or division taking place in the congregation itself, the trust subjects shall be held in trust for the members of the congregation, male and female, who may adhere to and remain in connection with, and subject to the United Presbyterian Church, or the body or bodies hereinbefore described."

of Kirkintilloch, whose minister, an able and energetic man, declined to go in 1847 into the United Presbyterian Church, and carried with him his congregational majority. The decision in his favour became at once a leading case,[1] and the Lord Justice-Clerk Hope's view in it of Lord Eldon's principle has, as we have seen, greatly modified the legal views put forward in the Campbeltown question. At the same time, it is necessary to remember what the title so elaborately construed was. The Kirkintilloch Church was held by

"trustees and fiduciaries for behoof of the members of the aforesaid Associated congregation in Kirkintilloch, commonly called Seceders, and presently in connection with the United Secession Church."

Such a title, though it went farther than those of Craigdallie and Campbeltown, by recognising at least a "present connection" with the Secession Church and Synod, was deliberately held (as those others had not been) to be a *trust for the congregation.* And in such a case it is not the principles of the whole body, but the principles of the congregation alone, that are to be looked at. The congregation here, indeed, alleged that the Synod had changed its principles, or at least its views. And there was no discussion, as in the former case, whether such a change was within the right, or even the duty, of the Synod (or of the Church and its parts). That question, perhaps, "might have been competent;" but it was not raised. It was superseded, in the view of the majority of the judges, by the admission that the congregational views were unchanged, and that they had only discontinued their subordination to the Synod when the Synod had entered into union with another Church. Neither does there appear to have been any proof in this case (or in those before or after it) as to what is implied in the "connection" or "subordination" of a Presbyterian congregation to its Church or body. The Court protested against "the

[1] Craigie *v.* Marshall, 25th Jan. 1850, 12 Dunlop, 523.

assumption that "connection with a dissenting Synod was as decisive a criterion by which to determine property and civil rights as adherence to the Established Church." It protested even "against the influence of any general notions of subordination, union, or schism." Any such thing "must be matter of contract proved in evidence, in order to be a subject for a court of law." In the state of the case all that could be done was to apply Lord Eldon's principle, which was now held rather to be, that the original trust was a trust for the original opinions or views of the congregation. And the Court applied it by holding that the original views of this congregation of Original Seceders—practically, therefore, that the original views of that body itself—were irreconcilable on several distinct points with those of the modern United Presbyterian Church.

But in addition to this exposition of Lord Eldon's general principle, the long and powerful speech of the Lord Justice-Clerk Hope laid down (with the full concurrence of Lord Moncreiff) a farther doctrine, which has very important consequences, and to which one Division of the Court has since given its approval. For while the Kirkintilloch case had some things in common with previous cases, it had others that were new. It was, like the earlier cases, a dispute whether a large body had departed from its principles. But the dispute in this case arose in consequence of the body having resolved to *unite* with another body of churchmen, and the particular congregation were found entitled to complain of the mere *union* as a departure from the separate identity to which their Church was bound. The question was fairly raised, How far is union possible to Churches that have been separate?

The Lord Justice-Clerk gave his opinion distinctly that, in the ordinary case of our Church tenures, if one congregation of a Church simply objects to its forming a union with another body, it is not bound to follow the Church into that union. "The right to refuse to submit

to any such changed government, or to concur in any such union," is, in his opinion, the leading and fundamental principle of all such associations, which he afterwards still more rashly expresses as "the desire to keep separate—to keep up one sect apart from all others." "Be the objection" (to union) "in the opinion of others valid or fanciful, it is a change to which no congregation is bound to submit. *For separation, then, when such union is to be entered into, no reasons, in my opinion, need be assigned.* The right to refuse is absolute; and the notion that the majority" of the congregation "is to forfeit their property, is, in my judgment, perfectly extravagant." These very strong statements are slightly qualified by the words that immediately follow; for his lordship adds, that such an idea is "extravagant, *and* without the slightest support *from any evidence that such is a condition of the trust.* Indeed I did not hear it maintained that obligation to unite with other sects was an original condition of this trust held for a congregation of Seceders. It would be a very strange condition to incorporate with any trust for a congregation of old Seceders."[1] This shows us the exact position upon this point of the Lord Justice-Clerk. He held that an obligation to union with a separate body was not an impossible thing, but extremely improbable—not to be presumed, but to be clearly proved—and that union might be resisted by a particular congregation, which would still retain its property unless it were specially averred and proved that it was bound by the trust of its title-deeds to go into it. Lord Cockburn objected to this doctrine, and to the principle of separatism on which it

[1] No one could have spoken thus of Seceders who knew anything of their old literature, or who remembered the burning passion for Presbyterian and national unity which distinguishes it. The very body of which this judge now spoke had in its fundamental document (see p. 212) a claim to "hold communion with all and every one who desire with us to adhere to the principles of the true Presbyterian Covenanted Church of Scotland," and an "appeal to the first free, faithful, and reforming General Assembly of the Church of Scotland."

presumed Churches to be founded, holding that "union—that is, the extension of what it thinks right—seems a necessary principle with every rational religious society." But Lord Moncreiff went fully as far as the Lord Justice-Clerk, holding that the union of separate bodies, with separate judicatories, was itself "an essential change in the constitution of either Church." He puts the question thus: "There being such a marked separation between the United Secession Church and the extensive body of the Relief, were the members of the Kirkintilloch congregation, when a union between these two bodies was proposed, *bound even to inquire* what the religious tenets or ecclesiastical opinions of the Relief Church were, so as to know how far they agreed with their own, or how far they differed from them? I apprehend that they were not; and that it was enough for enabling them to determine whether to consent, or to refuse to consent, to the union, that the Relief was an entirely different and separate Church of dissenters, with whom the Secession Church had hitherto had no connection." It may be that these principles have been laid down not as rules imported into all possible Church trusts, but merely as *presumptiones juris* in trusts too barely expressed; but they are laid down very strongly, and with great authority.

And they have been since reasserted, enlarged, and acted upon in an extreme case. It arose in consequence of union, not now with the United Presbyterian, but with the Free Church. About the year 1851 the Associate Synod of Original Seceders—a small but highly respectable body, dignified by the presence of Dr M'Crie (the biographer of Knox and Melville) and afterwards of his accomplished son—merged into the Free Church by the vote of a considerable majority. Their church titles were of course outside the protection of the Free Church trust-deed, and that of Thurso varied little from that already dealt with in Kirkintilloch. The Thurso congregation, however, had joined the union, a minority dissenting. An action (Couper *v.* Burn)

was brought by the minority of the congregation to have it declared that they were entitled to the property of the chapel, notwithstanding their dissent from the majority of the Synod and from the majority of the congregation. In this, as in the Kirkintilloch case, the chief stress was laid on the fact that the majority, by union, had departed from the original principles of the congregation, and that those adhering to these principles, whether majority or minority, were, as doing so, entitled to retain the property. Here, too, there was no right of deviation pleaded in defence; and the Court unanimously confirmed the Lord Ordinary's judgment that the views or tenets of the congregation—practically, again, of the body—were irreconcilable with those of the Free Church — the only other great body of non-established Presbyterians with whom they could unite. But Lord Wood, in delivering the unanimous judgment of the Court[1] to this effect, founded it upon the views of Lord Justice-Clerk Hope in the Kirkintilloch case, and held that not only a proved departure from principles by the majority of the Church, but their mere union with a body hitherto separate (even were its principles the same), was a thing to which no congregation was bound to submit, and against which even the minority of a congregation could successfully reclaim. After stating the question, he says, "Had the pursuers here been a majority of the congregation, instead of a minority, a direct answer would, we apprehend, be afforded by the judgment in the case of Craigie *v.* Marshall." But on principle the case is the same when only a minority reclaims. "A resolution to form a union with a separate body is not an act of management properly falling to be regulated by the voice of the majority of the congregation. It is one affecting and altering the use, possession, and destination of the property of the body. . . . According to the obvious spirit of the Kirkintilloch principle, the like circumstances and reasons which are of sufficient potency to entitle an adhering and resisting majority to

[1] December 2, 1859, 22 D. 120.

refuse to join a minority in a union with another religious body, *without its being necessary to establish that the minority by the union would be departing from original principles*, must also be available to an adhering and resisting minority." "We therefore hold that the principles and views recognised in Craigie *v.* Marshall are sound in themselves, and, when duly followed out, legitimately lead to the same result where it is a minority of the congregation that refuse to unite, and thereby sink their distinctive name and testimonies, and their very existence, in a separate sect, which was arrived at, where it was the majority that did so."

The authority of a principle like that thus initiated by the Lords Justice-Clerk Hope and Moncreiff, and confirmed by the unanimous judgment of a Division of the Court, is very great. Yet the greatest accumulation of authority cannot prevent the misgivings which are felt when this doctrine is looked at on the side of its results. That all dissenting Churches should be absolutely tied to their distinctive principles—*i.e.*, as these more recent judgments put it, to all their tenets—under pain of forfeiture of their property, might seem to be going far enough. It is a sufficient concession to the genius of sectarianism. But that they should be to all time forbidden under the like penalty to unite with the Established Church or with each other, even when it is not alleged that their doing so would compromise any of their principles, is a farther step. To perpetuate schism and subdivision of schism cannot be part of the public policy of the law, which rather tends to provide "*ne inimicitiæ hominum immortales, dum ipsi homines mortales, sint.*" Yet, upon the principles already quoted, and more fully detailed in the speeches in these cases, it would seem that a single individual in any dissenting congregation in Scotland may prevent that congregation from joining in a union with another Church whose principles are alleged, and not denied, to be identical with its own—that, in short, not only unity of principle, but unanimity of individuals, is required before any such union can take place,

or at least before it can take place without forfeiture of property. And under this condition, *Vestigia nulla retrorsum*, all the large property of all the splits and sections of dissenters, seceders, and protesters in Scotland would thus be held in all time to come.

Admitting that the doctrines laid down in and after the Kirkintilloch case have been stated in rather an extreme way, and one that seems to lead to startling consequences, it may, it is thought, be denied that any decisions of the Court on this subject necessarily bind upon it for the future what is so extravagant. For they have all been mere applications of the law of trust, which is essentially a law of equity; and for any needed qualification in the future of doctrines which may have been laid down too broadly in the past, it is only necessary to revert to the original principle of Lord Eldon, and to remember that the law of the trust is the law of the case. Thus if, instead of the older Scottish doctrine which made the decision of the judicatories conclusive as to the principles of the congregation and the destination of its property, recent cases seem to hold that the decision of the judicatories is absolutely of no consequence, it may be enough to recall the illustrations of the Lord Chancellor in the Craigdallie case, and to remember that the question is at all times a question of fact, Did the principles of the congregation submit it to the judicatories, or did they not, and to what extent and effect? And when it is laid down that the union of two Churches which had been hitherto separate is necessarily an abandonment of their principles, it is implied that these Churches have not averred, or at least have not proved, that part of their original principles was an obligation to unite with separate Churches holding like doctrine or practice with themselves. There is in every case implied a decision on some question of fact—on the question of fact, What was the original trust? And any imagined failure on the part of the Court to arrive at the right result in the past only lays on future litigants the

duty of more carefully furnishing the Court with the materials for its decision, according to the legal presumptions now established — presumptions which abundantly suggest where and how heavy in each particular case is the burden of proof.

But whether the principles laid down in these two cases shall be held in future by the Bench to be mere general presumptions or absolute rules—a matter for the authority of the Court to declare rather than for students of the law to anticipate—these general principles, as applied to property held for the use of a congregation (which is described as a congregation of or in connection with a Presbyterian body), seem to be as follows :—

1. That in such a case the trust is a trust for the congregation.

2. That therefore the destination and use of the property must be regulated by the principles of the congregation—not of the ecclesiastical body with which it is connected.

3. That when the Church, or general ecclesiastical body, changes its principles, it cannot compel the congregation to go along with it.

4. That where the Church, without changing its principles, merges its separate identity by union with another body, it cannot compel the congregation to go along with it.

5. That not only a majority, but even a minority of the congregation, has a right to vindicate the congregational property in the two cases last mentioned. The minority of the congregation may demand the property in the event of the majority acquiescing in the departure of the whole Church from (1) its principles, or (2) its separate existence.

6. But unless the minority take action, the act of the majority is presumed to be right; and the minority must take action at the time, or without undue delay.

The last rule is derived from the case of Cairncross *v.*

Lorimer (Carnoustie case), May 28, 1858.[1] The action was one nearly the same on the merits as the Thurso case recently quoted; but it was thrown out on the ground that the minority of the congregation of United Original Seceders, who objected to the union of the majority with the Free Church, had not raised the question *debito tempore*, and having delayed three years, must be held to have acquiesced. Against this it was very strongly urged that the nature of the title as one of trust, as laid down in the decisions already referred to, made it of no consequence when the objection to perversion of the property was raised. The replies of Lord Wood (who, as we have seen, gave the judgment in the Thurso case, which went farthest against union), and that of the Lord Justice-Clerk Hope (one of the last decisions of that most laborious and energetic lawyer), are instructive, and seem to show, if not a modification of the general views they elsewhere laid down, at least a shrinking from extreme applications of them.[2] The case, too, went to the House of Lords, where the judgment throwing out the case on the ground of delay (the action being one brought not by officials, but by individuals for a personal wrong done them) was affirmed; and the Lord Chancellor Campbell added, "I confess I should have been sorry if we had been obliged to pronounce a judgment which would have given such facility to the stirring up and the revival of disputes between the different dissenting religious persuasions into which Scotland is unhappily divided, and I feel great satisfaction in being able, according to the well-established principles of Scottish law, to advise your lordships that this appeal be dismissed with costs."

It is striking that this, the first judgment of the House of Lords on property since Lord Eldon's, should be rather a check to recent extreme if not one-sided

[1] Or Cairncross *v.* Meek, 20 D. 995. Affirmed in House of Lords, 9th August 1860: 22 D. (House of Lords), 15; 3 Macqueen, 827.

[2] Lord Wood, 20 D. 1002; Lord Justice-Clerk Hope, 20 D. 1001.

applications of Lord Eldon's principle. The Court of Appeal was before long to give an important judgment on the legislative duties and rights of a Church. But in the mean time the Court below was involved in a peculiarly fruitless complication under its old topic of jurisdiction.

The Free Church had supposed that its claim to independence of the State even inside establishment, and to a jurisdiction by no means derived from the Crown, would have prevented all trouble after it had constituted itself anew on these foundations. But it was not to be so. Seventeen years after, one of their ministers was accused of misconduct; and the "libel," partly sustained by the presbytery, but wholly refused by the Synod, came by appeal to the Assembly. The Assembly, having all the evidence in print, insisted on taking up the whole matter as it had originally come before the presbytery, and found the accused guilty to a considerably larger extent than had been originally done. This course was taken only after reasoning on Church law and the *nobile officium* of the Assembly, the incompetency of it being pleaded by the accused at great length before the sentence. But after it he at once appealed to the civil court (against a judgment whose results no doubt affected his civil interests and emoluments) by presenting a Note of Suspension and Interdict. The interdict was refused by the Court, but the Assembly resolved "to cite Mr Macmillan to appear at their bar." He appeared accordingly (preceded by a messenger-at-arms, who now served upon the moderator a Summons of Reduction of the previous sentence), and being ordered by the Assembly to say (Yea or Nay, without explanation or defence) whether or not he had authorised the application to the civil court, he answered Yes; upon which, by the immediate and unanimous resolution of the Assembly, and "in respect of the reply so given," he was deposed on the spot from the office of the holy ministry.

This exceedingly characteristic proceeding[1] resulted in two actions of reduction and damages—reduction of the two sentences by the Assembly, and damages against it in respect of each of them—and the two actions were subsequently conjoined. The mere actions of damages would have excited no great interest in Scotland, for actions of damages, even against churchmen, are there supposed to be always competent, if rightly laid. But the forms of Interdict and Reduction, the former designed to arrest, and the latter to annul, Church sentences, were precisely those which had been enforced by the Court on the Church as established, and against which it had gone out protesting. The conjoined actions were accordingly strongly resisted; and of three judgments delivered by the First Division in the Cardross case, the first two were against the Church, while the third was in its favour, and dismissed the action. That the two first were bad decisions, at least of this particular case, there is no doubt. And this is clear not merely from the third, by which the action was thrown out at last as it ought to have been at first, on the mere and obvious ground of its form (as a Reduction without damages); but in view also of two important subsequent decisions, one of them carrying the authority of the House of Lords.

Yet though the first decision sustaining the Reduction in this case is no longer law, I still think some of the reasons by which it was maintained are of general importance. It was then decided again that every Church in Scotland but the Established Church is to be regarded as a mere voluntary association for religious purposes, founded upon contract between the members. And it was now solemnly ruled, in the face of the most strenuous

[1] One of the many ancient Acts held as part of its constitution by the Free Church, though since 1843 they are scarcely available to the Church of Scotland, was founded on here. It is certainly strong enough, for the Act 1582 provides "excommunication summarily without any process or admonition" of those who go to the civil power to stop Church process, and the attempt to stop it was on that occasion made by Bishop Robert Montgomery holding King's Letters from James the Sixth!

opposition, raised not by an Episcopalian but by a Presbyterian Church, appealing to the ancient conception of a church as imbedded in Scottish legislation, that such a church has in law no jurisdiction, and consequently that it has no defence against *producing* to the Court a sentence alleged to be in violation of its own contract. Practically, the generally wholesome rule that the Court will always insist on *examining* every sentence complained of (whether they will thereafter judge of it or not),[1] was nearly all that was decided at the first hearing of the cause. On this occasion[2] the Church was ordered to produce the sentences complained of, reserving *all* its pleas against the right of the Court to judge of them when produced.

The second step in the case dealt with those pleas, in a way which was a logical consequence of the principle already laid down. The pleas of the Church defending in this case were of two kinds—some which were stated as common to it with all Christian Churches, and others which were founded on its own constitution and contract. It pleaded, first, that, simply on the ground of its being *a church*, its church sentences could not be reviewed; and only thereafter went on to plead the special ground of its being the Free Church, with such and such a constitution. And the Court by their finding gave the greatest prominence to this distinction. The two general pleas of the defenders were as follows:—

1. The sentences complained of being spiritual acts, done in the ordinary course of discipline by a Christian Church, tolerated and protected by law, it is not competent for the civil court to reduce them, and the action should therefore be dismissed.

3. As the actions, in so far as they conclude for reduction of the sentences complained of, do not relate to any question of civil right, the actions cannot be maintained.

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[1] The Toleration Act provides that the doors of the churches tolerated shall not be locked, barred, or bolted while the worship permitted is going on. An instructive analogy.

[2] Macmillan *v.* the General Assembly of the Free Church, 22 D. 290, 23rd Dec. 1859. It is difficult to say how much of this decision is still law.

These two pleas were *repelled.*

Besides these general pleas, the defenders presented the following:—

2. The pursuer, by becoming and continuing a minister of the Free Church, and by having voluntarily acknowledged and submitted himself to its authority in spiritual matters as final, cannot maintain the present actions, which should therefore be dismissed.

5. As the sentences complained of were pronounced in the exercise of the authority belonging to the courts of the Free Church, as acknowledged by its members, and to which authority the pursuer had subjected himself, no decree for damages can be pronounced.

These pleas were *reserved.*

And they were reserved expressly on the ground "that the parties are not agreed as to the terms of the constitution of the Free Church of Scotland."[1] That is, the pleas founded on public privileges of Churches were rejected, while those founding on private contract were retained. The pleas common to all Churches were disregarded, but those proper to the individual Church in question were reserved. This result was exactly what the legal principle already laid down demanded; and it was that also which might have been safely inferred from the current of decision before the disruption of the Church in 1843. The Court then steadily refused to listen to theories, whether drawn from Scripture or the Confession of Faith, as to what "a church" was, and demanded proof from statute or otherwise of what powers had been expressly given by the State to this particular institute. And in spite of chance hints thrown out to the contrary,[2] it was plain that, if the question were too precipitately raised, a similar principle would guide its dealing

[1] See Lord Jerviswoode's interlocutor, adhered to by the First Division, 19th July 1861, 23 D. 1314. He had also refused Interdict.

[2] "If these gentlemen wish to maintain the situation of what they call a Christian Church, they would be no better off than the Catholic Church, or the Episcopal Church, or the Burghers or Antiburghers; but when they come to call themselves the Established Church, the Church of Scotland—what makes the Church of Scotland but the law?"—The Lord President in the second Auchterarder case, Kinnoull *v.* Ferguson, March 5, 1841, 3 Dunlop, 778.

with dissenting bodies. But it was fit that that Church which in the Establishment had maintained its supposed native and original rights with unparalleled boldness and power, should now maintain the same position as the self-constituted representative — not of the Church of Christ established in Scotland, but of the Church of Christ pure and simple.

At this second hearing of the Cardross case the Court took pains to make the form of Reduction more palatable to churchmen—not only by pointing out that it was still to be settled whether the sentence to be produced would be at all judged of on the merits, but by another consideration. They pointed out that there would in any case be no Reduction, except as auxiliary to a claim for damages. The suspended or deposed minister would not be restored, in the sense of being forced upon the body which had sentenced him. The Court, the Lord President said, may give damages for the loss of a leg, but it will not stick it on again. On this the Court seems to have been from the beginning unanimous. Lord Deas had at the first judgment stated the general principle in the form most obnoxious to the Scottish Church in all its branches. "All jurisdiction flows from the supreme power of the State." But even this blunt and able judge pointed out that "reduction" must be combined with "non-intrusion" into the Church sphere.

> It has never occurred to me, and I do not think it has been suggested by any of your lordships, that such reduction could go farther than removing the sentences out of the way as an apparent obstacle to patrimonial redress. Nobody contemplates that the defenders are to be ordained to receive the pursuer back into their association. If I dismiss a teacher wrongfully, the law will compel me to pay him, but the law will not compel me to be taught by him.

This gave a new aspect to the idea of an action of Reduction, and made a vital difference between the present case and the Reduction in 1843, when the statutory Church had to "receive back into the association" its deposed ministers, and when interdicts, refused in this case, were enforced on

every hand. But it still left the question—for the Court, however, rather than the parties—whether the Reduction was in such a case a desirable form at all. So far as the particular action was concerned, a very conclusive light was soon and unexpectedly thrown upon this point.

At the *third* hearing of the cause, when parties were prepared to discuss whether such a case as this should go to a jury, the Court, very much *proprio motu* (the church defending, represented by the Lord Advocate Moncreiff, declining to take the objection), pointed out that there could be no action of damages allowed against the General Assembly. It was a large unincorporated body, meeting only for ten days in the year for ecclesiastical purposes, and whatever case might be made (perhaps by alleging malice) against individual members, the body could not be subjected in damages. But if so, there was no civil or patrimonial claim; and the Reduction, which was merely preliminary and auxiliary to the substantial money claim, must go too. Lord Deas in vain attempted to maintain that the Reduction might stand by itself; and the decision against his view has been confirmed, in another case thirty years later, by a unanimous judgment of the same Division.

The final decision of the Cardross case—that a Church court is in law an invisible, and on that account (but on that account only) an inviolable body, may be held by some to be a roundabout way of admitting its claim to be a "spiritual body,"[1] with no powers except those which its members have given it for moral ends.[2] But it left the

[1] Yet some lawyers have reasoned that its being safe from penalty is the very reason why a Church, or a Church court, should be dealt with by reduction, while the conclusion for damages finds out individuals. At a certain great fireplace, where law and poetry found room to meet, it was put thus: "A spiritual body means just a ghost; and a ghost cannot be injured, least of all by a reduction." And the answer was borrowed. "A ghost cannot be injured. But it may be wronged; and

'We do it wrong, being so majestical,
To offer it the show of violence;
For it is, as the air, invulnerable,
And our vain blows malicious mockery.'"

[2] See notes on next three pages.

law of Scotland (as we shall see under the Skerret case) in a very belated condition as compared with other jurisprudences. And for the sake of other Scottish Churches (not to speak of litigants) it is unfortunate that it did not at least inquire and ascertain how far the contract or constitution of the Free Church, as acceded to by her recalcitrant office-bearer, gave it authority—how far it was a "contract of jurisdiction." There is no doubt whatever that it would have turned out to be, in the intention of the parties, and as a contract between them, a contract of jurisdiction—a yielding to jurisdiction in the strict sense of the word.[1] This might be proved without difficulty in the case of every Presbyterian Church in Scotland—certainly in

[1] The only doubt that has arisen on this subject is from the occasional use of the word *jurisdiction* in the sense of what has been called *coercive* jurisdiction—a right not only *jus dicere*, but also to enforce the law declared. And it is argued this cannot even be pretended to by unestablished tribunals.

Assuming, for the sake of argument, that this is contained in the proper meaning of the word, there is no difficulty in seeing how the Apostle John, or Polycarp, could claim jurisdiction within the Christian Church as truly as any of their successors recognised by Constantine. Their judgment, or that of the humblest Christian Church, is not necessarily futile because it is not enforced by civil law. "Whatsoever ye bind on earth shall be bound in heaven." It is not necessary that the law should believe this; it is only necessary that the law should believe that the Church believes this. For this justifies the Church's use of the word, and makes a coercive jurisdiction of the highest kind. But it is not even necessary to be so transcendental. For, in every case, the sentence has its proper coercive effect within the Church, upon the consciences both of the culprit and of others, and affects their whole relations; and that without any appeal to civil law. Indeed, the results and consequences which civil law has to do with are always remote and secondary, and are not the proper and immediate objects of the sentence. Church jurisdiction is jurisdiction *quoad spiritualia*. For the temporal consequences, as the Church of Scotland always acknowledged, appeal may have to be made to the magistrate; for these belong properly to the province of the magistrate. But the churchman is *functus* before the civil judge is appealed to. The civil coercion belongs to the jurisdiction of the civil judge, who may be appealed to even on the ground of contract and fairness to add these consequences; but whether he chooses to add his coercion or not does not affect the religious jurisdiction, which is already explete and finished.

It always comes back to the same point. The courts may not hold

the case of every Presbyterian non-established Church;[1] and in the case of the Free Church, with its modern documents all referring to claims lying in the full blaze of Scottish history for centuries back, it is probably more undoubted than in the case of any other Church in the world. But that certainly does not exhaust the matter. Assuming that this was the intention and contract of the parties, how far

that the Christian Church has jurisdiction until it is established; but its own members do. And their use of the word is equally accurate with that of our law, and a great deal more ancient.

All this is trite in Scotland, and may be found coming out even in the English courts, as in the judgment in the Privy Council case Colenso *v.* Gladstone, 1866 (Eq. Rep. iii. 1).

[1] The *a fortiori* nature of the claim of the Free Church and other non-established bodies in Scotland is very strongly alluded to by the Lord Justice-Clerk Hope in Sturrock *v.* Greig, quoted from in a former chapter. While indicating in several parts of his judgment that he had no doubt dissenting judicatories could claim the same protection from actions of damages which that judgment gives to the Established Church, *even against allegations of malice*, he adds, "The view that may be taken of this matter by independent religious bodies, unless their constitution is very express, *may go much further;* and it may be that their Church courts may have, as against their own ministers, the sole right to decide what is competent matter for Church discipline and ecclesiastical government."

An early anticipation of it may be found in Lord Moncreiff's judgment on the unreported case of Osborne *v.* the Southern Reformed Presbytery. His lordship's judgment was as follows:—

"*Edinburgh, July* 5, 1831.—The Lord Ordinary having considered this bill, with the answers and productions, and having heard parties by their counsel,—In respect that the complainer admits that he was a member of the religious society referred to, that he received his ordination as a minister from this Reformed Presbytery, and that he bound himself to submit to their jurisdiction as an ecclesiastical body; and in respect that it does not appear to the Lord Ordinary, according to the statement of the complainer himself, that he had been loosed or released from that connection and jurisdiction in regard to his ecclesiastical status, finds it incompetent for this Court to interfere to stop the proceedings of the respondents in the matters alleged, which are purely of an ecclesiastical nature: therefore refuses the bill as incompetent, finds expenses due, and remits the account, when lodged, to the auditor to be taxed.

"JAMES W. MONCREIFF."

This reads like a full acknowledgment of ecclesiastical claims, but his lordship's note places these distinctly on the ground of contract:—

"*Note.*—The complainer having voluntarily bound himself, as a member of this association of Christians tolerated and protected by law, to submit to the discipline of the Pres-

would the Court have carried it into effect? There are some possible heights of authority—some conceivable incidents even of jurisdiction—which it rather seems the courts would not have acknowledged, however clearly it were proved that they were submitted to. Yet, on the other hand, the principle that the Court has proper and primary jurisdiction, does not make it by any means impossible for it to recognise another "prorogated" jurisdiction founded upon voluntary and private contract.[1] There was a strong leaning to this in the third or closing decision in the Cardross case in 1862;[2] and since then, without any pronouncement or very sharp change of view on the matter, there has been a gradual progress of our law to a position of safety for the future. There has, no doubt, been an influence upon this region of jurisprudences outside; for those

bytery, according to the ordinary principles of Presbyterian government, the law will recognise the obligations thereby come under as matter of contract. This gentleman admits that he was charged with certain matters of a proper ecclesiastical nature; and while the Presbytery were *in cursu* of prosecuting the charges, he says that he intimated that he wished to renounce the connection, and cease to be a member of the society. But the Lord Ordinary apprehends that an ordained minister of any such sect or association cannot, merely by saying so, relieve himself from the jurisdiction, once solemnly contracted; and that the legal effect of the contract is, that the Presbytery must have authority to prosecute to an end the measures of Church censure or discipline which they have begun, unless the party has been loosed from his connection with them by their own act."

[1] The words of a famous judgment of Lord Stowell may be used to illustrate this. Speaking of a question turning on a Scottish marriage, he says, "The cause being entertained in an English court, must be adjudicated according to the principle of the English law applicable to such a case: but the only principle applicable to such a case by the law of England is, that the status or condition of the claimant must be tried by reference to the law of the country where the status originated; and having furnished this principle, the law of England withdraws altogether and leaves the question of status in the case put to the law of Scotland." The puzzle in the Cardross case as to two possible jurisdictions is effectually unravelled here; but the real question is, whether civil law *will* allow to a Christian Church, in the unestablished and merely tolerated form which it held for the first centuries of its existence, that jurisdiction which it appears to have then claimed, and which Scottish Churches at least have always claimed.

[2] 9th July 1862, 24 D. 1282.

systems are still greatly ahead of us. About the time of the Cardross decision in 1862 the most important deliverance upon this subject in the courts of the United Kingdom was the principle of the Privy Council decision in the case of Long *v.* the Bishop of Capetown. It was stated as follows in Feb. 1863 (1 New Ser. P.C. Cases, 461):—

> The Church of England, in places where there is no Church established by law, is in the same situation with any other religious body—in no better, but in no worse position; and the members may adopt, as the members of any other communion may adopt, rules for enforcing discipline within their body which will be binding on those who expressly or by implication have assented to them. It may be further laid down that where any religious or other lawful association has not only agreed on the terms of its union, *but has also constituted a Tribunal to determine whether the rules of the association have been violated by any of its members or not*, and what shall be the consequences of such violation, then the decision of such Tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and if not, has proceeded in a manner consonant with the principles of justice.

The Courts of Scotland had not by any means got so far as this in recognising voluntary tribunals.[1] Yet Churches in Scotland had from time immemorial been much more explicit than those of England in constituting them; and if our Court were to ignore their voluntary jurisdiction, it must do so on some other ground than the doctrine of contract. The difficulty came latterly, to be as to the use of an ecclesiastical word, jurisdiction. In 1843 there was a question whether it was not used by the Church in the sense of jurisdiction from the Crown. In 1862 there could be no such question: such a jurisdiction was the very last thing which could be either imputed to the Free Church or desired by it. But the Scottish courts still affected an unwillingness even to use the word in its immemorial ecclesiastical sense; and in this again they were behind the Privy Council, which went on to say—

[1] Scarcely even in the last judgment in the Cardross case.

In such cases the Tribunals so constituted are not in any sense Courts; they derive no authority from the Crown, they have no power of their own to enforce their sentences—they must apply for that purpose to the courts established by law, and such courts will give effect to their decision, as they give effect to the decisions of arbitrators, whose *jurisdiction* rests entirely upon the agreement of the parties.

These are the principles upon which the courts in this country have always acted in the disputes which have arisen between members of the same religious body not being members of the Church of England.

What the English judges here call the jurisdiction of arbitrators has always been acknowledged, in substance if not in word, in the law of Scotland, and the analogy [1] came about this time to be repeatedly the subject of discussion on our Bench.

[1] See indications of different leanings of opinion as to this analogy in the later stages of the Cardross case. They came out also in a brisk exchange of sentiments in Lang *v.* the Presbytery of Irvine (vol. ii. of New Series of Reports, p. 823, March 5, 1864), in the First Division, where Lord Deas says: "The only other observation I have to make is this, that as we are here dealing with the procedure of a constituted court of the country, the principle is different from the principle applicable to a voluntary association — different as respects their right to regulate their own procedure and power of process, and as respects the principles of their constitution. In the case of a voluntary association, the question resolves itself into a breach of a civil contract, and I know no law for holding that malice is necessary to render parties liable for a breach of a civil contract. That was the sort of question that occurred in the case of Macmillan against the Free Church." Lord Ardmillan, in the close of his judgment, said: "In consequence of what has fallen from Lord Deas, I feel it to be my duty to state my deliberate opinion, that in this matter of privilege in judicial proceedings there is no difference between the judgment in matters spiritual of the Church courts of the Established Church, and the Church courts of nonconforming bodies, provided there is jurisdiction which by law or contract the parties are bound to recognise, and a judgment pronounced by judges whom by law or by contract the parties are bound to obey. In both cases I think that the judgment is privileged, and that malice must be alleged." Lord Deas: "I must explain that I did not give any opinion as to what would be the law in the case of a civil contract with a voluntary association acting within the contract. The case to which I referred was one in which it was distinctly alleged, and offered to be proved, that the parties had acted not according to, but in violation of, the contract. It was of that case alone I spoke." Lord Ardmillan, "I referred to no particular case."

But this word-splitting meant denial of justice to our litigants and arrested development to our law. Thus in the Cardross case. If the Court had glanced, even for a moment, at the constitution of the Free Church and the contract of its members, it would have found that it was a contract to submit to jurisdiction, and that in the intention of the parties this was intended to exclude all civil redress for such mere irregularities in form of process or otherwise as the Court refused to review in the Established Church in the case of Lockhart *v.* Deer. But the allegations of Mr Macmillan in the Cardross case were more serious than those of Mr Lockhart in the other case, and the Free Church Assembly's taking up and judging a part of the case not appealed to it from the inferior court might be argued to involve not forms of process merely, but questions of Church constitution. The mere acceptance of the word jurisdiction, so fruitlessly contested in the early stages of this case, might therefore not be sufficient at once to solve the question. It could only have done so if jurisdiction of Churches outside were accepted in the large and imperial sense of the English Privy Council (and, it may be added, of the Supreme Court of the United States) as "a tribunal to determine whether the rules of the association have been violated by any of its members or not." The right of the Assembly to pronounce even on constitutional Church questions was one of the most important of those claimed in the contest before 1843; and there can be no doubt that in the Free Church at least it became at once fundamental. Both before and after 1843 it was applied to far more important matters than gathering up that part of a presbytery's libel which had been dropped by the Synod, and going on to deal with the whole evidence. *That* proceeding had always been claimed as part of the function of an Assembly; and whether it were referred to "jurisdiction" or to "*nobile officium*," the word, though technical and appropriate, would in

either case have been objected to, but the thing would since 1843 be easily shown to be part of the Church contract. It could be proved to be part of "the rules of the association." But would the Court not have required it to be proved? To have simply (like the English Privy Council) accepted the Assembly's right "to determine whether the rules of the association have been violated" might have seemed in this case to make it judge in its own cause. The Court would probably have preferred to give it, under the name of jurisdiction at least, an authority not much wider (if at all) than that which civil law has expressly given to the Established Church courts. And the real importance of the Cardross case is that it was (or should have been) a step of transition to those which we are about to notice—cases which turn, not so much on the jurisdiction of a Church court, as on the self-government and legislation of the Church itself.

The case which closed this period, like that of Dunbar which opened it, was a Scottish Episcopal one; but it was greatly more important. Forbes *v.* Eden was a reduction brought by a clergyman (afterwards a bishop) against the Bishops and General Synod of his Church, to set aside not a particular act of discipline, but a new Code of Canons, on the ground that there was no right to change them. And the result was still more remarkable. The general relevancy of the case was sustained by the ablest judge the Scottish Bench has known during the latter half of the century—the Lord Justice-Clerk Inglis (who, however, threw out the pursuer on the facts). But his view was disavowed by the House of Lords, on grounds so generally applicable as to make this by far the most weighty judgment in the region since that of Lord Eldon in Craigdallie. The change in the canons to which Mr Forbes objected was an alleged new and dangerous latitude in the delicate matter of the Communion Office; and almost

the only civil or patrimonial loss he pretended was that his objection to such a change might make him resign his pastoral office. Such a case, the Lord Ordinary (Barcaple) thought, afforded no ground for a reduction. But the Second Division, or at least its head, afterwards Lord President, held it to be ground, if proved, not only for reduction but for interdict. He laid down the general principle as follows:—

"If a society, whether for religious or secular purposes, is bound together by articles of constitution, and an attempt is made to alter any fundamental article of the constitution, the general rule of law undoubtedly is, that the majority may be restrained, on the application of the minority, from carrying the alteration into effect."

The principle, and its application to voluntary churches, were denied in the House of Lords. And the illustrations, by the same judge, of what in his view fundamental articles might be, were not the more reassuring that they were gratuitously thrown out. He pointed out that the creed of the Scottish Episcopal Church at present is the Thirty-nine Articles. In last century, and until recently, it seems to have been the Confession of Knox. Could they revert now from their present standard to their former? "The whole body would have power to make the change, if they were unanimous. But a majority, I apprehend, would have no power to do so against the wishes of a minority, however small." Again, passing from doctrine to ritual, "If the Synod, whose acts are here complained of, had passed an ordinance prohibiting the use of all set forms of prayer, the result would be the same; and any one having sufficient interest might complain of it as a breach of contract, because in this communion it seems to be a fundamental article of the constitution, since 1811 at least, that set forms of prayer shall be used in public worship."

These startling illustrations from the chair of the Second Division left very little autonomy to any Church to which

they might be applied. In some respects they recalled the extreme views of its immediately preceding occupant, the Lord Justice-Clerk Hope, as to the rights of a minority to bar Presbyterian union without assigning a reason.[1] But as pointing to the remedy of reduction, and still more of interdict, they had very little support even on the Scottish Bench; and the views of the Lord Ordinary (Barcaple), against which they were directed, were in this very case so largely adopted by the Court of Appeal that we give the more important part of them in a note.[2]

[1] The decision was on 8th Dec. 1865, reported 4 M. 1843.

Mr Hope had preceded Mr Inglis as counsel in the interdict and reduction cases against the Church before 1843.

[2] Lord Cowan said in the Division: "I cannot but regard it as an entire novelty to ask courts of law to determine whether the ruling judicatory of a voluntary Church acted within its power in matters so purely and exclusively relating to the government of the body as a Church, its doctrine and discipline."

And Lord Barcaple as Ordinary had put the same thing more fully and deliberately: "It appears to the Lord Ordinary that the present action proceeds upon a fallacious view of principles, which have been recognised in these cases, and of *dicta* which had reference only to the questions then under consideration. When, in defence against an action on account of something done by an ecclesiastical body, it was pleaded that the matter, being ecclesiastical, was solely for the determination of that body itself, it was effectually replied that that was an assertion of exclusive power of jurisdiction, which could only rest upon contract, and that the contract was to be found, if anywhere, in the constitution and laws of the Church. In the discussion which thus arose, the constitution and laws of the Church came to be referred to as 'the contract' upon which the question turned, and most correctly; for by reference to them the question of jurisdiction, or of the legality of the proceeding complained of, was to be determined. The fallacy of the present action appears to the Lord Ordinary to be, that the pursuer treats the canons of his Church as if they were primarily and by their main intention a contract between the members of the Church. Taking this view, he complains that the terms of his contract have been changed without his authority, and to his injury. Analogies are brought forward drawn from other associations, formed for entirely different purposes, and having nothing equivalent either to the authority which is vested in synods and other ecclesiastical bodies, or to the regulations for the doctrine and internal government of a Church. And the Court is asked to deal with the canons of a Church as they are from time to time enacted by the proper authority, as if they were nothing else than attempted modifications of the con-

The reverend appellant pleaded his own cause to the House of Lords with great learning and zeal; and the Lord Chancellor (Chelmsford), in proposing judgment against him on 11th April 1867,[1] ruled that it was "a mere abstract question involving religious dogmas." But he went on to divide his reason for refusal into the two branches already suggested in the Campbeltown case — *i.e.*, whether the change complained of was fundamental or constitutional; and whether, if so, there was not a right of changing the constitution.

It does not appear to me that the Canons of 1838 can properly be regarded as the contract between the members of the Scottish

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tract between the members of an association for ordinary civil purposes. This is, as the Lord Ordinary thinks, altogether a fallacious view, and quite unwarranted by the authorities referred to. The canons of a Church are not enacted for the purpose of constituting a contract, but to establish and regulate its doctrine and discipline. The contract, in the sense in which that expression is important in these discussions, may or may not be embodied in the canons. They are only to be looked at as giving evidence, more or less complete, in regard to it." And again: "Into matters of this kind courts of law have always refused to inquire, except for the purpose of vindicating a civil right or protecting against a civil wrong. Even in that case the courts have never given the remedy by altering or setting aside proceedings taken by the ecclesiastical authorities within their proper province, and least of all by making or unmaking regulations for the doctrine or discipline of the Church. The pursuer, indeed, does not ask the Court to pronounce as to the theological soundness of the doctrines in question, but only as to whether they are not now brought in as an innovation. But civil courts do not undertake to protect Churches, or individual members of Churches, from the influx of new doctrines. They only interfere to prevent the uses of property being perverted through its being retained by a majority who only keep the name, while they have abandoned the principles, of the Church to which it was devoted. The proposal to give such a remedy as is here asked, against the canons regarding the powers of the bishops to establish missions, and the power of general synods to make and alter canons, may appear less startling, because they are not strictly matters of theological doctrine, though they are not less polemical for that reason. But the Court will as little interfere to impose upon a dissenting body immutability of Church government as immutability of doctrine; while in either case it will protect property from being diverted, or persons from being injured, by the consequences of changes on doctrine or constitution."

[1] 5 M. (H.L.) 36.

Episcopal Church at the time when the appellant was ordained to the ministry. They are principally, if not altogether, directed to the regulation of order and discipline, and contain nothing with regard to the fundamental doctrines or articles of faith upon which the constitution of a religious community depends. But assuming that the Canons of 1838 are to be taken as the contract between the members of the Scotch Episcopal Church, the appellant subscribed (amongst the rest) to the 33rd Canon, which declares that "a General Synod of the Church, duly and regularly summoned, has the undoubted power to alter, amend, and abrogate the Canons in force, and to make new Canons." And by his subscription to the Thirty-nine Articles he agreed that the Church has authority over rites and ceremonies, as declared in the 20th and 34th Articles.

Lord Cranworth's judgment, which followed, is of great importance; for it commences with a general proposition as sweeping as that which we have quoted from Lord President Inglis, and which it was intended to meet:—

> There is no authority in the courts either of England or Scotland to take cognisance of the rules of a voluntary society entered into merely for the regulation of its own affairs, save only so far as it may be necessary that they should do so for the due disposal or administration of property. . . .[1]
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> These considerations go to the root of the present case. . . . Assuming that the General Synod of 1863 had no power, according to the constitution of 1838, to make the alterations of which the appellant complains, that of itself gives no jurisdiction to the superior courts. There is no jurisdiction in the Court of Session to reduce the rules of a voluntary society, or indeed to inquire into them at all, except so far as may be necessary for some collateral purpose. The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it. If connected with any office in a voluntary association there is the right to the enjoyment of any pecuniary benefit, including under that term the right to the use of a house or land, or a chapel, or a school, then incidentally the Court may have

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[1] This universal proposition has undoubtedly a bearing on the final decision in the Cardross case (as well as in that of Skerret, to be afterwards recorded); for in both of these the Court refused to "take cognisance of the rules," or of the infraction of the rules, of a voluntary society, unless a patrimonial or "property" loss was alleged, and a specific civil remedy asked for in the same action. In both, too, the interdict sought was *in limine* refused.

imposed on it the duty of inquiring as to the regularity of the proceedings affecting the status in the society of any individual member of it; but here there is no question of that sort. . . .

This, Lord Cranworth held, was sufficient; but he thought it right to consider whether, even if reduction were a competent remedy, the pursuer had shown a case for it. And his answer went very deep into the question of principle:—

The appellant rests his case on the analogy which he supposes to exist between the body associated as the Scotch Episcopal Church and an ordinary commercial partnership. He contends truly that, unless so far as the articles of partnership authorise it, no change can be made in its provisions by the mere will of a majority of the partners, nor indeed without the concurrence of every individual of which the partnership is composed. And he contends that on the same principles the Synod, or general assembly of persons associated as a Church or religious body, can have no power to alter the Canons or rules of that Church or religious body without the consent of every member of it, except so far as they are expressly authorised to do so by the terms of their constitution. But the Synod of a Church seems to me to resemble rather the Legislature of a State than the articles of association of a partnership. A religious body, whether connected with the State or not, forms an *imperium in imperio*, of which the Synod is the supreme body, when there is not, as there is in the Church of England, a temporal head. If this is so, I feel it impossible to say that any Canons which they establish can be treated as being *ultra vires*. The authority of the Synod is supreme. It may, indeed, be that a Synod or general assembly of a religious body has no power to affect civil rights already acquired under existing Canons or rules; but that is very different from saying that the Canons or rules themselves have no force among those who have no such complaint to make.

Before concluding, Lord Cranworth noticed a curious point in connection with the express power to change which the new Canons contained:—

The only other part of the new Canons of which the appellant seeks reduction is the 20th article of the 28th Canon, which declares that the General Synod shall have power to alter, amend, and abrogate Canons in force, and to enact new Canons, provided that such alterations, amendments, abrogations, and new Canons be in conformity with the recognised constitution of this—that is, the Scotch Episcopal —Church. The same power is found in the 33rd Canon of 1838, ex-

cept that there the alterations, amendments, abrogations, and new Canons are required to be in conformity with the recognised constitution and *acknowledged practice* of the Scotch Church. The appellant argues that the omission of these words, *and acknowledged practice*, vitiates the new Canon, as giving to it a force which the old Canon did not possess. I do not feel any force in this objection. The remarks which I have already made, on what I conceive to be the general power inherent in a Synod, are sufficient to show my doubt whether one Synod can validly control the power of another which is in the nature of an independent legislature. But even supposing this could be done, and supposing, further, that these words amounted—which, however, they do not—to a prohibition on the Synod against altering, by virtue of its inherent power, the acknowledged practice of the Church, and not merely to a restriction of the power conferred by the 33rd Canon, still, I think, the subsequent Synod was entitled to say that these words were necessarily included in the other words "*recognised constitution*," and so to reject them as inconvenient surplusage. Nothing can be described or imagined as constituting the acknowledged practice of the Church, which would not also be properly described as part of its recognised constitution.

This exhausts all the parts of the new Canons of which the appellant seeks reduction. To state shortly, therefore, my view of the whole case, I am of opinion—1st, That the Canons made from time to time by Synods of the Episcopal Church of Scotland are to be treated merely as the rules of a voluntary society over which the Court of Session has no jurisdiction, except in cases where the interpretation of them is necessary for a collateral purpose, as for determining the rights to trust property depending on their construction ; 2ndly, That no such questions of right are raised on this record ; and, 3rdly, That, even if the validity of the new Canons had been properly before the Court, the appellant has not shown any valid ground of complaint.

Lord Colonsay, who had been President of the Court of Session, and when there had proposed the final judgment in the Cardross case, entirely concurred in the views which had been stated :—

A court of law will not interfere with the rules of a voluntary association, unless it be necessary to do so in order to protect some civil right or interest which is said to be infringed by their operation. Least of all will it enter into questions of disputed doctrine when it is not necessary to do so in reference to civil interests.

He saw here no objection to the mere form of the action,

because a reduction might have been necessary to support the other conclusions. But these could not be supported. For

> the Canons of this Church are, according to the recital in the Canons of 1838, matters applicable to the discipline of the Church, which it is declared that the Church has power to alter from time to time;[1] and the recital of the Canons of 1838 bears that the Church has from time to time altered and repealed some of those Canons. There must be some supreme authority; and looking at the power of the Synod in the mode in which my noble and learned friend who last addressed the House put it, I think the Synod, which is the supreme authority in this Church, had the power to regulate and change those matters ordained (as the Canon expresses it) by man's authority, which the recital of the Canon of 1838 declares that every Church has power to regulate and change. I cannot, therefore, hold that it was *ultra vires* of the Synod of 1863 to make that alteration.

This case must always retain a pre-eminence in our Scottish jurisprudence, being the first in which the Courts of Appeal dealt directly with a non-statutory *Church*, as distinguished from a mere congregation. The case which the House of Lords and Lord Eldon had finally decided in 1820 was as to property held in trust for a congregation. But Lord Eldon's congregational principle, that when a division arises you must go back to the original trust, seems equally applicable to a whole community or "Church"; and this principle, at all events, was that put forward by the appellant here. But does the original trust mean all the original doctrines on the one hand, or all the original practice on the other? The answer of the supreme Court of Appeal seems to be very much on the lines of the *second*

[1] This recital, or introduction, has been dropped in the 1890 Revision of its Canons by the Episcopal Church in Scotland. A certain power of alteration, however, is recognised in the Articles of the Church of England, which the Scottish Church still signs. On page 16 of the 1890 Revision the reader finds the following rule added, which would have been very important if in existence when Mr Forbes raised his litigation: "The form of subscription promising obedience to the Canons of this Church (Appendix VI.) implies only obedience to their requirements, and not necessarily approval of everything therein contained, or that may be supposed to be inferred therefrom."

or more theoretical judgment in the Campbeltown case. For as that judgment had indicated that there may be non-essential things in a doctrinal confession, the present pointed out that there may be the same in a Code of Canons. And the Court of Appeal was now far more outspoken as to the right and duty of the supreme ecclesiastical authority—whatever that may be—to make the change on behalf of the whole Church, where change is lawful and desirable. In the present case, indeed, there was a great peculiarity (referred to especially by Lord Colonsay). The preface to the Scottish Episcopal Canons—retained in the new Code objected to by Mr Forbes as in the old (though it has been omitted in a subsequent revision in 1890)—made this strong statement:—

> The *doctrine* of the Church, as founded on the authority of the Scripture, being fixed and immutable, ought to be uniformly received and adhered to at all times and in all places. The same is to be said of its *government*, in all those essential parts of its constitution which were prescribed by its adorable Head. But in the *discipline*, which may be adopted for furthering the purposes of ecclesiastical government, regulating the solemnities of public worship as to time, place, and form, and restraining and rectifying the evils occasioned by human depravity, this character of immutability is not to be looked for.

But while the Scottish Episcopal Church may hold this,[1] other Churches may hold, and have held, otherwise. They may hold, on the one hand, that some rules of discipline are at least as essential as many doctrines; and, on the other, that the "character of immutability" in all its doctrines is not essential to a particular Church of Christ, which is under a constant obligation to go back to Scripture. So far as Scotland is concerned, the whole history which we

[1] In the new revision of the Canons, made in 1890, we find the following interesting paragraph:—

"*Of the interpretation of this Code of Canons.*

"The preceding Canons shall in all cases be construed in accordance with the principles of the Common Law of Scotland. Nevertheless it shall be lawful in cases of dispute or difficulty concerning the interpretation of these Canons, to appeal to any generally recognised principles of Canon law."

have reviewed shows that here, too, doctrine has a fundamental place. Yet apart from such facts as the exchange of one whole Confession for another, the prescribed rule for Presbyterian change is a suggestive counterpoise to the paragraph just quoted. The "Barrier Act," dating from 1697, proceeds on the idea that important change ought to be the act of the Church as a whole, and not merely of one representative Assembly, which is merely its annual organ. And accordingly procedure is provided by which the sense of the whole Church is taken. But this is done that *sudden* "alteration or innovation" be avoided "in *either doctrine, or worship, or discipline, or government*," thus co-ordinating in respect of lawful change the regions so sharply distinguished in the old Episcopal preamble.

Nor does it appear that our law, least of all in the House of Lords, has committed itself to either of these contrasted theories. Its view on this last great occasion seems to be broadly, that whatever is held essential by a Church (whether doctrine or practice) will be given effect to by the law; and that whatever the Church deliberately holds itself to have power to alter, the law will permit it to change.

CHAPTER III.

1867 TO 1902.

THIS final period of our Scottish Churches opened with a crash in the ecclesiastical world of Europe. In 1867 the project was published of a Vatican Council, and in 1870 it proclaimed the Pope as supreme governor of the Latin Church in all lands (instead of being, as was before supposed, merely its supreme judge on appeal), and both functions were now strengthened by the Council's confession of his doctrinal infallibility. But this consolidation was balanced in the same year by a breach with three great Catholic but now constitutional Powers, Austro-Hungary, Italy, and (after Sedan) France; and by the immediate loss of the Temporal Power.

The Catholic Church in Scotland, which has hitherto successfully avoided public conflict in or with our law courts, must be supposed at this time to have passed (with the rest of the Latin Church) through a great change or a great development. Yet it may not have been so great as in some other parts of Europe; for very early, and before the time of Sextus IV., the Pope claimed to act as Metropolitan of Scotland, and it seems to have been decreed by Honorius III. "that the Church of Scotland, as a favoured daughter, should be subjected, without any intermediary, to the Apostolic See." In 1472, however, a regular Hierarchy was constituted under two Metropolitans, which held Provincial Councils like other national Churches, and was only swept away at the Reformation. And the great external change

in modern Scotland did not take place till 4th March 1878, when Catholicism in Scotland (which had been carried on for three centuries under Regular Missionaries, Apostolic Vicars, and Bishops *in partibus infidelium*) was again put under an Episcopal Hierarchy by Leo XIII.'s Bull of that date. The change in the relation of the modern Hierarchy and Church to the centre of Latin Catholicism is not wholly left to implication; for the Bull provides that

> Whatever may have been in force, either on account of the ancient condition of the Scottish Church, or from peculiar constitutions adapted to the subsequent condition of the Missions, or from particular privileges and customs, shall carry no right and no obligation. And to the end that in this matter no doubt may hereafter arise, We, in the plenitude of Our Apostolic authority, take away all force of obligation and of right from those particular statutes, ordinaries, and privileges of every kind, and from customs, though handed down and prevailing from the most ancient and immemorial time.

The jurisdiction of Rome carried on *in partibus* in Scotland for the last three centuries was of course opposed to the provisions of the statutes of 1560 and 1567, and so is that of the new Hierarchy. But no penalties or liabilities are now exigible,[1] and the restoration caused no protest or opposition in Scotland such as agitated England in 1850. Indeed it may be questioned whether Catholic jurisdiction has ever been unlawful, except in the sense in which all dissenting jurisdiction in Scotland was and perhaps is. The chief doubt arises from the fact that Catholic jurisdiction claimed to embrace all Scotsmen—certainly all baptised Scotsmen—whether willing to be members of the Church or not. Such a claim might well have been exceptionally resisted by our civil law. But, unfortunately, our civil law put it out of its own power to protest against it as unfair. The jurisdiction given by the Reformation statutes themselves to the Church established expressly includes all

[1] An opinion to this effect by the late Lord Fraser, then Dean of Faculty, was published in the Scottish newspapers about 15th March 1878.

Scotsmen, willing and unwilling; and it was specially intended to sweep in and coerce the adherents of the older faith.

Catholic Church property in Scotland was, during the time of its proscription, held in the names of individuals and their assignees, excluding legal heirs—the Church trust being latent. In more recent times it appears that the titles are often taken in the names of individuals as trustees for the Roman Catholic congregation of a particular place. Here the same sort of trust is raised which we have so often seen in Presbyterian cases; but the nomination of new trustees is now likely to be vested in the Bishop. It does not appear that any question of property has ever been tried in our courts arising out of a breach of sentiment or opinion between a Roman Catholic congregation and the Church to which it belongs. In such a case the principle of the Kirkintilloch decision—that the trust is a trust for the congregation, and that its original principles (doctrines?) must override any supposed authority in the general body of the Church—would come into the sharpest conceivable collision with the Church theory. Lord Eldon's judgment, on which the later decision professes to be founded, makes no distinction between Churches which are founded on doctrine, and Churches which are sources of doctrine. Yet there can be little doubt that, in the event of a Scottish congregation and its trustees seceding from the great Latin Church, on the ground of its having changed its doctrine (as was alleged at the Trent and Vatican Councils, and on the promulgation of the Immaculate Conception [1]), means would be found for proving that the local trust was held, not so much for a certain doctrine as for a certain institute, and that the trust barred all inquiry into the doctrine after the ecclesiastical institute had pronounced upon it. The question whether the Church is a living organism continually evolving doctrine, or a mere teaching institute

[1] According to the Thurso case, such an action could be brought by a minority of any congregation, however small.

uttering doctrine long since fixed, is at the root of most of those problems which law reluctantly discusses. It may have been too rashly assumed that the Protestant Churches are adequately described under the latter category. But there can be no doubt that the Roman Church belongs to the former, and that trusts for behoof of its congregations are trusts not for certain doctrines, but for a certain external authority.

The Presbyterian Churches were at a distance from this shock of principles in Catholic Europe. Even the educative influence of the nearer questions brought before the awakened British electorate—in particular, the question of the disestablishment and reconstruction of the Church in Ireland—had on the side of the Scottish non-established Churches been already anticipated. Years before, they had commenced, and they were now by large majorities prosecuting, negotiations for a great union outside the establishment. That meant that the long battle of the United Presbyterian Church for combined religious freedom and civil justice was in this century to attain its reward. In the Free Church, too, the people generally were coming to be of opinion with the Disruption leaders in 1843 (and, it may be added, with the judges on our Bench and in the House of Lords), that their attitude and that of the original Free Church was practically a farewell to Establishment.[1] We have already seen that the Church established had about the same time adopted the project of the abolition of Patronage, and that with a view to the immediate conciliation of the Free Church.[2] Both communions felt that

[1] Dr Chalmers in 1841 said, "If we do not succeed, national establishments of religion will and ought to be put down." And Dr Cunningham, in his letter in 1844 to American Presbyterians, held that the fellowship of the Churches in a community "would have a far more important bearing upon the interests of religion and the welfare of Christ's people than anything the civil power could do," even if it were to offer the Free Church establishment on its own terms.

[2] P. 112.

each had a legitimate interest in what was done by the other, and that sooner or later, in a small country like Scotland, a door must either be open or shut. But some wider questions than either establishment or union were raised at the same time, and by none more interestingly than by Dean Stanley. In January 1872 he came down to Edinburgh, and in four sympathetic lectures discussed the ecclesiastical history of Scotland,[1] deprecating the too strong convictions of its free Presbyterianism, and pointing out that a Church to be really national should carry something like a blank shield. Before the month ended he was answered in three powerful lectures[2] by Robert Rainy, destined to be for the rest of the century the one successor in the leadership of the Free Church of its great group[3] of founders, and in its closing year not only the first Moderator of the United Free Church, but, in the words of Professor Masson, the acknowledged statesman and "national functionary" of Scotland. And while that early utterance already suggested much in the protracted history that was to follow—not least Principal Rainy's characteristic as a leader, to lead as little as possible, and to make a minimum of provision for the future—there were passages in it also to which Presbyterianism throughout the world responded with a common vibration.[4]

[1] Lectures on the History of the Church of Scotland. By A. P. Stanley, Dean of Westminster. 1872.

[2] Three Lectures on the Church of Scotland. By Robert Rainy, D.D. 1872.

[3] "Great men—the best and greatest I have ever known."—The late Duke of Argyll in 1874.

[4] One of these may at this point be inserted in view of some things to follow:—

"Presbyterianism meant organised life, regulated distribution of forces, graduated recognition of gifts, freedom to discuss, authority to control, agency to administer. Presbyterianism meant a system by which the convictions and conscience of the Church could constantly be applied by appropriate organs to her affairs. Presbyterianism meant a system by which quickening influence anywhere experienced in the Church could be turned into effective force, and transmitted to fortify the whole society. Presbyterianism meant a system in which every one, first of all the common man, had his recognised place, his defined position, his ascertained and guarded privileges, his responsibilities inculcated and enforced, felt

But for years before 1870 four of the greater Presbyterian Church bodies in Britain, all Scottish in origin, had been engaged in elaborate negotiations towards their proper goal of union—federal or incorporative. The results were various and important. 1. There were two immediate incorporative unions, one in Scotland and one in England, both in the year 1876. That in Scotland was between the Free Church and the Reformed Presbyterian Church (*Cameronians*); and it led to an important litigation, which we shall have to notice. The other was connected with the peculiar position of the United Presbyterian Church—which, it will be observed, never called itself "of Scotland," and thus emphasised the right (which they all, however, claimed) of extending themselves beyond any territorial or national boundaries without losing their Church identity. But the United Presbyterian Church had already a number of Presbyteries — a considerable Church body — on the English side of the Border, and the question now arose of union of these with the fourth negotiating body, THE PRESBYTERIAN CHURCH OF ENGLAND. This powerful offshoot of the Scottish Established Church had strongly sympathised with the contention of the parent body with the State in

himself a part of the great unity, with a right to care for its welfare, and to guard its integrity. From the broad base of the believing people the sap rose through Sessions, Presbyteries, Synods, to the Assembly, and thence descending diffused knowledge, influence, organic unity through the whole system. Yes, Presbyterianism is a system for a free people that love a regulated, a self-regulating freedom; a people independent, yet patient, considerate, trusting much to the processes of discussion and consultation, and more to the promised aid of a much-forgiving and a watchful Lord. It is a system for strong Churches,—Churches that are not afraid to let their matters see the light of day—to let their weakest parts and their worst defects be canvassed before all men, that they may be mended. It is a system for believing Churches, that are not ashamed or afraid to cherish a high ideal, and to speak of lofty aims, and to work for long and far results, amid all the discouragements arising from sin and folly in their own ranks and around them. It is a system for catholic Christians, who wish not merely to cherish private idiosyncrasies, but to feel themselves identified with the common cause, while they cleave directly to Him whose cause it is."

1843, and at the Disruption had at once associated itself with the Free Church, formally resigning its Establishment connection. But the second immediate result of the negotiations was that it now joined itself—not federally but by incorporation—with the members of the United Presbyterian Church in England,—the latter body gladly yielding its southern branch to heal the territorial division. It was a conjunction in England in many respects prophetic of the larger union of Free Churchmen and Voluntaries which the end of the century was to see in Scotland. 2. The four negotiating Churches, finding, as to all of them, that there was no bar in principle to their union, provided for congregational and ministerial intercommunion by a system of "Mutual Eligibility." By it any minister of one of the four has from that date become eligible to any pastorate in the others. In addition the United Presbyterian Church arranged a triennial Federal Council with the Presbyterian Church of England, and soon after the Free Church (by this time united with the Reformed Presbyterians) was gathered into it. The four (later on three) negotiating Churches had still their Supreme Courts meeting annually during the rest of the century; but to each of these the other Churches have since the time of these negotiations sent members as delegates, who had a consultative voice if not a vote. 3. The most important part of the fourfold question, the union of the United Presbyterian Church with the two other Scottish Churches, was the central subject of negotiation, and was thoroughly worked out. The finding, that there "is no bar in principle" to an incorporating union, was accepted nearly unanimously by the United Presbyterian Church. In the Free Church it was proposed by Dr Candlish, its leader since the Disruption, by Mr Murray Dunlop, its legal adviser, and by Dr Robert Buchanan, its historian; and it was passed not only by the Assemblies, but by the Church, with a considerable majority under the Barrier Act. But a large minority dissented. Their dissent was backed by the threat not only of secession but

of legal proceedings. The negotiations were accordingly closed for the time; neither the absence of any bar in principle, nor the provision for secession in the trust-deed, being held sufficient ground for provoking a schism under the name of union. The two Churches accordingly entered formally not only into the Mutual Eligibility scheme already mentioned, but into the cultivation of "all such methods of Christian fellowship as can be carried on without incorporation," and informally into a very hearty practical and public alliance. Those leaders of 1843, too, who were so soon to disappear, placed on the records of Assembly a weighty statement of their conviction that the full union, already approved in principle by both Churches, must before long be carried out.

The negotiations and resulting unions led, as has been said, to one litigation; which raised, though it did not solve, all the chief legal questions in this Church region.

The Reformed Presbyterian or Cameronian Church has already been sufficiently described, as the one ancient body among Scottish Dissenters claiming even a pre-Revolution origin.[1] Though joining the Free Church by a majority of four-fifths, it was still much smaller than that communion, and could scarcely expect it to change its name—a name which, indeed, expressed the principles of the Reformed Presbyterians better than their own. It was necessary, therefore, for the Church of Cameron and Renwick to ensure that in union—passionately as their communion had for generations desired it—their special principles and views should not be submerged in a majority which did not share them. And accordingly a stipulation of freedom to hold these in the united Church, and another that that Church should consist of both Churches "as existing previously to the Union," were agreed to—provisions repeatedly quoted since then in the Assembly when Free Church members suggested that there was

[1] P. 211.

no change of identity in 1876. There were in addition provisions, which did not come to be much needed in practice, for a Synod *quoad civilia* being held even after the Union.

The legal question arose on the Reformed Presbyterian side, and it fortunately related, not to a congregation or its property, but to the whole Church's share in the "Ferguson Bequest"—a sum of £300,000, left in 1856 for the annual support of churches and schools belonging to four Presbyterian and one Independent body in Scotland. Was the body which had merged itself and its "Reformed Presbyterian" name in the Free Church to retain its share? Thirteen years before the Union there had been a small Secession from the Reformed Presbyterian Church, because, contrary to its earlier usage, it in that year declined to exercise "discipline" upon those of its members who voted for representatives in the British Parliament. The Secession then claimed to be the true body, but the Ferguson Trust had declined to give them even their share in the Reformed Presbyterian money. Now, when the general body had united with the Free Church, the old minority saw that their time had come, and they claimed not a part but the whole, to the exclusion of those who had gone into union. The case of Wallace *v.* The Ferguson Bequest Fund, 6 Rettie, 486, thus raised the general question of union. But it was also the first in which the right of legislative or constitutional change, which "might have been pleaded" in the Campbeltown and other cases but was not, was deliberately brought forward. There were some difficulties; for when the Cameronians in time past had put forward "Testimonies" (*i.e.*, Church utterances for the times), they were apt to bind their members to them as "attainments" never to be resiled from. But their two hundred years' history sufficiently proved that these Testimonies had from time to time been exchanged, and these attainments superseded; all being done, too, in virtue of a fundamental Church obligation, which pressed upon the conscience of

each new generation in turn.[1] The interest of this case turned largely upon the question how it would be dealt with by Lord President Inglis, the ablest lawyer of the last generation, but whose extreme view against a Church's right of development, expressed in the case of Forbes *v.* Eden,[2] had been discountenanced in the House of Lords on appeal. In the present case he did not follow the Lord Ordinary, who had pronounced against the legitimate union of the two Churches on grounds very similar to his own in Forbes *v.* Eden, and, it may be added, to the Lord Justice-Clerk Hope's in that of Kirkintilloch. But neither did he admit that two Churches which had once become fully organised could act on the Presbyterian obligation to unite and yet retain their legal identity. He escaped from the difficulty by an able sketch of the early condition of the Cameronians, as for a century and a half merely a number of scattered congregations, and by the final suggestion that it would not do therefore to hold, that no one could now belong to this body "who does not acknowledge the authority of the Reformed Presbyterian Synod, *which was constituted for the first time in* 1811." On this slender ground, combined with the much stronger consideration that Mr Ferguson's bequest was not one strictly or directly to organised bodies, while it left a certain discretion to his trustees, the Lord President avoided any formal discussion of the difficulties

[1] On the Free Church side, too, of this case, Sir Henry Moncreiff and Dr William Wilson, the Clerks of Assembly, and both authorities on Church law, gave evidence that the constitution of their Church was to be gathered, not from the documents of 1843 *plus* the previous constitution of the Church established, but, in addition, from many an act of freedom before and after 1843, which down to that date would have been of doubtful validity, but since then are no longer doubtful, being clearly competent to the one body and incompetent to the other. As Sir Henry Moncreiff's name is now mentioned for the last time, it may be right to record his 'Creeds and Churches in Scotland' (Edinburgh, Edmonston & Douglas, 1869), an elaborate review of the earlier edition of the present work, chiefly from the Free Church constitutional point of view, with an appendix on some related questions.

[2] P. 278.

of the past, and saw his way to the equitable solution of giving the money to both sides according to their numbers. The other judges agreed on the result, but went farther in their reasons. Lord Mure held that the Cameronian changes were not of "fundamental principles and tenets," but merely of "matters of regulation." And Lord Shand, reverting to general principles such as were suggested in the Campbeltown case[1] but not thereafter followed, maintained the right of both majority and minority to take different views, and in consequence to separate, while yet retaining their legal rights. The Court seemed to be unanimous in reversing the Lord Ordinary on one curious point—his throwing out the pursuers on the ground of *pactum illicitum*. The "pact" in this case was an ecclesiastical one against the acknowledgment of the British Crown, Constitution, and Courts.[2] The pursuers' *case* was that the defenders had ceased to enforce it. The Lord President held that to deny them action upon this ground would be against the "principles of toleration" of our modern law—a liberal construction, which should make the acceptance of a mere "contract of jurisdiction," and other things held by this Presbyterian Church in common with all others, very easy indeed.

The decision was manifestly a compromise. And yet this was the only grave case in the Supreme Courts of Scotland affecting the non-established Churches during the *thirty years* since the last was carried in 1866 to the House of Lords. During that long period the development of these Churches was steady and slow. It has already been recorded[3] how they were led, on occasion of the Patronage Act in 1874, to take publicly the position that Scotland's ecclesiastical future must be based on

[1] Pp. 236-240.

[2] Sir Walter Scott's readers will remember the difficulty of David Deans as to the appearance in the Edinburgh court of a witness for his daughter's life. He is supposed to have been a Cameronian long before the Synod of 1811, but even then "ane humble pleader for the guid auld cause in a legal way."

[3] P. 114.

non-establishment (or, as the Free Church preferred to put it, on disestablishment); and how, in 1877, Lord Hartington pledged English Liberalism on that subject to Scotland. But in the same year, 1877, an event of great interest took place, the meeting in Edinburgh of the first PAN-PRESBYTERIAN COUNCIL—a consultative and non-legislative body, but with representative delegates from all the Churches of the name. It has since then met periodically in various parts of the world, but its first meeting was of peculiar importance in questions of constitution and representation. In particular, a call for returns from all the Churches as to their relations to creed, moved by the writer of this volume and seconded by Principal Tulloch, brought out valuable results.[1] And the world-wide gathering imported into Scotland clearer information as to what may be called the common law of Presbyterianism on the one hand, and on the other as to the attitude towards it of at least one great jurisprudence.

Presbyterianism is a body of some fifty Churches, divided by the Atlantic into two not unequal parts, and embracing some twenty or thirty confessions or creeds. The Churches on the continent of Europe go back historically to the Confessions of the Reformation; but they have all more or less altered their relation to those documents, and many of them in the nineteenth century adopted (in some cases alongside of the old, and in others instead of the old) shorter utterances of central truth.[2] In Britain and America they go back historically to the new creed shaped by the free Puritan Church at Westminster. But even

[1] They are tabulated in the 'Report of Proceedings of the *Second* General Council of the Presbyterian Alliance,' to which the returns ordered by the First were presented in 1880. The committee, headed by Dr Schaff, the modern historian of Creed, had bestowed three years' labour upon them.

[2] The carrying out of this in the Reformed Church of France led, in 1872, to the finest debate of modern times on the subject of Creed. This discussion, in which M. Guizot and other eminent men took part, is given in full in Bersier's two volumes, 'Histoire du Synode Général,' Paris, 1872. But English readers will find the chief points summarised in the 'British Quarterly' for April 1873.

with this creed all the free Churches had more or less revised their connection. Some, in America, only tied themselves to the "system of doctrine" contained in it; others, in Scotland, held it "an exhibition" of their understanding of Scripture; and others had exchanged it for a creed wholly different in form, but alike in substance. The motive in some of these cases was a mitigation or modification of the general Calvinistic system; but the sharpest pressure in almost every instance came from the intolerant powers of "the magistrate," now felt to be dangerous alike to civil liberty and to Church freedom. The difficulty of these clauses or chapters had been in some cases dealt with by declaratory enactments, like those of the two chief Scottish Churches in 1846 and 1847. But in America the Creed itself was so far revised in 1787, and these objectionable clauses expunged and others put in their place.[1] In 1837 and 1892 the question came up as to the more properly doctrinal portions of the Creed; but it was only this last year, 1901, that the report of a committee recommending that these be amended "either by modification of the text or by declaratory statement" was received with favour by the Assembly of the Presbyterian Church in the U.S.A. In some cases these changes in or of creed protected the existing subscription from revisal. But generally the revision of the subscription was felt to come first and to be more obviously within the ordinary duty and jurisdiction of the Church. Nor is creed[2] by any

[1] For these, and corresponding changes in America on the Thirty-nine Articles, see Dr Schaff's volume on Modern Creeds, p. 653, or the author's 'Church and State,' p. 202.

[2] This opportunity of noticing a world-wide Presbyterianism as it exists historically, and in fact, enables me to omit the long note on the *theory* of Church and Creed to be found in the previous edition (p. 471), and transferred some years ago to certain 'Studies in Scottish History.' One paragraph, however, I retain; for it points to distinctions obvious in themselves, but too often ignored:—

A Confession may be a mere utterance or manifesto emitted at a particular time, but of no value after the occasion has passed away. Or it may be an utterance of a Church at a particular time, which ever after retains an historical value, though no

means the only region in which the law of Presbyterianism permits important variations from time to time within the unity of the system. There are forms of it in which elders are elected for a term of years only, and other forms in which city ministers are not attached to particular congregations, but minister to all in rotation; and these are mere illustrations of the internal or constitutional changes which all its branches claim right to make, while preserving through them all an unchanging jurisdiction.

The largest Presbyterian Churches of the world are in the United States, and this legislative power to deal with other constitutional questions as well as creed was long ago there explicitly put. They thus avoided the difficulties of the Church of Scotland in its legislation before 1843, and the scruples as to creed and innovation which have hampered the Scottish Churches outside. And they have anticipated (in a clearer and more satisfactory way) the provision for the future which we shall find to be made by the United Free Church of Scotland. For in 1788 the American Church ratified a Form of Government and Discipline "as the Constitution of the Presbyterian Church in America," the Westminster Confession, as altered the

attempt is made to make it a standard or test, or even a permanent Confession. (One or other of these has been known in Scotland as a "Testimony.") Or it may be a permanent utterance or *declaratio* by the Church of its belief, valuable to this effect so long as it is unrecalled, but not at all made use of as an internal standard to which the views of members are to be conformed, or as a test either of membership or office—a confession, not a standard. Or it may be both a confession and a standard, a dogmatic rule according to which the Church judges all views of sacred truth, and up to the level of which it trains its people and invites its ministers; and yet it may not be made an antecedent test for either the one or the other. Again, the subordinate standard may be made to serve the purpose of a test, by an ordinance that those who do not believe in it shall not be admitted to a certain privilege, or to a certain office; or even shall be no members of the Church society at all. And, lastly, this may be enforced, either in the case of ministers or members, by a demand for evidence of this belief, or at least for evidence of this profession of belief; as, for instance, by subscription.

previous year, "making a part of the Constitution." But while this Constitution, in doctrine and government, was to be "strictly observed as the rule of their proceedings" by "all the inferior judicatories," the necessities of the changing future were not forgotten, and the following clause provides what would be called in Scotland a Barrier Act, but expressly applied to constitutional change. It was

resolved—That the true intent and meaning of the above ratification by the Synod is, that the Form of Government and Discipline and the Confession of Faith, as now ratified, is to continue to be our Constitution and the confession of our faith and practice unalterable, unless two-thirds of the presbyteries under the care of the General Assembly shall propose alterations or amendments, and such alterations or amendments shall be agreed to and enacted by the General Assembly.

The United States of America has much larger Protestant churches than the Presbyterian, and the distinction attained by its law courts in the region of international jurisprudence and conflict of laws, combined with the two-fold rule of its constitution, that Congress shall pass "no law respecting an establishment of religion, *or* prohibiting the free exercise thereof," make the comparison of its law in this region with that of Scotland very interesting. It seems to have been extraordinarily successful,[1] and a great case, decided five years before this Edinburgh meeting, gave an opportunity for the Supreme Court of the States to lay down general rules on the subject.[2] These seem to go almost if not quite as far as that already quoted from the

[1] Partly on account of the interposition of civil "societies" or corporations between the ecclesiastical bodies and the law. See Tyler's 'American Ecclesiastical Law.'

[2] Watson *v.* Jones, 1872, Wallace's Supreme Court Reports, xiii. 679. I was indebted to eminent American churchmen on both sides of this test case (between North and South after the war) for information enabling me to follow it to what seemed a final, because a State court, decision. But both parties had by this time got too much interested in the question of law to acquiesce in such finality. And I gather that half-a-dozen of the appellants were at this stage shipped across the river at Louisville, and kept in residence there till they became members of the neighbouring state, and so entitled to bring their case to the Supreme Court of the Union as one between members of two different and independent states!

English Privy Council,[1] and the American law generally includes at least these positions: 1. It acknowledges a voluntary jurisdiction in every Church, leaves all Church questions to the decision of the Church itself, and refuses to review them. 2. It claims control of Church property and funds, and where an express trust as to their uses is alleged, it inquires into and enforces it, but only as to the property, refusing to interfere with internal Church action or membership. 3. Where no express trust is specified, and property is held for Church purposes generally, the law presumes that the decision of the Church majority—or, in Presbyterian Churches, the Church tribunal or Supreme Court—is right, and declines to inquire farther, or gives effect by its authority to the judgment of the voluntary tribunal.[2]

The example of world-wide Presbyterianism had probably no more direct effect on our Scottish Churches than that of foreign courts had upon our insular jurisprudence. They developed from within, and two years after the United Presbyterian Church took the lead. It had already, in a previous generation, worked out for itself (and, as it turned out, vicariously for the Free Church also) those questions as to the too partial and narrow aspects of confessional Calvinism which at present occupy the Church established in Scotland and non-established in America. The result had been agreement and peace; and it now passed a Declaratory Act explaining or modifying the Confession of Faith in various points, and particularly declaring that "liberty of opinion is allowed on" some "points in the standards, not entering into the substance of the faith." The Free Church was to attain the same position later on, but had first to pass through the controversy as to Professor Robertson Smith. This young Aberdeen scholar, challenged for having taught that Deuteronomy was written, long after

[1] Pp. 274, 275.

[2] For a fuller statement of American Church law and its relation to such questions see the 'British Quarterly Review,' October 1876.

Moses, by a sacred author who borrowed Moses' personality for dramatic purposes, replied by laying down a general position as to Scripture. It is only divine, he held, and only infallible, when it reveals to us "that knowledge of God and His will which is necessary to salvation." The Assembly of 1880 left "the ultimate decision" of these critical views "to future inquiry in the spirit of patience, humility, and brotherly charity;" but that of next year, startled by some newer applications of them, terminated Dr Smith's professorship without trial and without condemnation—properly enough offering at the same time to continue his salary, which he with equal propriety declined to receive. Under the influence of other pupils of Professor A. B. Davidson of the New College, Edinburgh, this Church continued its study of questions of critical scholarship. One brilliant layman of this communion, Hugh Miller, had in early and pre-Darwinian days familiarised Scotland with the long procession of races on the earth before human history. And another, Henry Drummond, founding on the principles of evolution, now traced the ascent of man through it all to his place of perilous pre-eminence. In 1884 the Free Church carried out a long-delayed reform with regard to the subscription of "deacons"—*i.e.*, those younger men in the congregation who, not being rulers or teachers in the Church, have no place in presbytery or Assembly, but are appointed to take an active part in receiving and using the contributions and other temporal possessions of the congregation. They had been massed with other "office-bearers" in the Act 1846, and so called upon to subscribe in the same terms to the Confession of Faith—an absurdity which had been for many years pointed out, especially by Dr William Cunningham, who among the founders of the Free Church was reckoned its chief theologian and constitutionalist. Now at last the anomaly was removed, and instead of these younger men in the Church owning "the whole doctrine contained in the Confession of Faith," they were asked to "own and receive as in accordance with Holy Scripture

the system of Evangelical Truth taught in this Church, and set forth in the Westminster Shorter Catechism." It was not till 1892 that this Church also passed its Declaratory Act, on lines so similar to the other that both may be given (in Appendix D to this Book) in parallel columns.

We have come now, in 1896, to the last great *Jurisdiction case* in the courts of Scotland—Skerret *v.* The Synod of the United Presbyterian Church.[1] As decided, it did little more than confirm the law of the equally futile Cardross case, nearly forty years before. But the ground of action in this (as in a number of recent cases) was more important, and there was a strong indication that the Court must find or make some means of doing more justice in such cases alike to Churches and to individuals.

The Skerret case had certainly strong points of resemblance with the Cardross case. In both, the minister of a voluntary Church, complaining that he had been deprived of his office by an illegal sentence, applied to the Bill Chamber for interdict against its being carried out. In both, the interdict was refused. In both cases, he then brought a formal action which contained other conclusions, but which became substantially an action of reduction. In both, the churchmen, called as defenders, pleaded that no case was disclosed for their "satisfying production," and the Court decided against them, reserving their pleas. And in both, when the case came up for consideration, the same Court threw it out on the pursuer's statement, and without asking or allowing any proof. The ground of rejection in both cases, too, is, if not identical, very nearly so. Reduction of the resolutions of such voluntary associations, it was once more explained, is competent, but only "on the way" and "in so far as it may be necessary" to a specific remedy for invasion of patrimonial rights. In Macmillan[2] the con-

[1] Skerret *v.* Oliver and others, 30th January 1896, 23 R. 468.

[2] Macmillan *v.* The Free Church Assembly, Beith and Candlish 1862, 24 D. 1282.

clusion for reduction was followed by a conclusion for damages. But it was directed against the Free Church General Assembly as a body,—a body which the Court, rather late in the day, held could not be made liable in damages, though individuals forming whole or part of it might be. And the civil remedy of damages being imperative, they refused the reduction left standing by itself. In *Skerret* there was no conclusion for damages, but the pursuer reserved right to claim them on account of the illegal sentence, and in the mean time a reduction of it, "in case it may be necessary," was concluded for. And here, too, the Court refused to sustain a case "which begins and ends with reduction," on the ground that no "specific civil remedy" appropriate to the facts was even proposed. Both branches, therefore, of Lord Deas' position in the Cardross case must be held now to be cut away, and it must henceforth be considered fatal to a reduction, at least in Church cases with a view to damages, either—(1) "that the damages are not claimed in the same action;" or (2) "that being claimed, the conclusions for these damages are ill-laid."

Hitherto the form of reduction in such cases has been a mere trap for pursuers, whose patience, or whose purse, has turned out to be exhaustible. And they have been disposed to complain of the Court in Scotland, which at the first hearing of their story has been elaborately hospitable, and later on has thrown them out on precisely the same facts, and for reasons which seem to the outsider technical and narrow. In the present case the Lord Ordinary doubted from the first whether a reduction were necessary. But this repeated frustration of justice has been due not so much to the mere form of action, as to the Court stumbling at the threshold over the Church word "jurisdiction," and to the renewed affectation of taking it in the other sense, of jurisdiction from the Crown—a sense in which the Churches concerned, and indeed the Presbyterian Churches generally, are so far from claiming jurisdiction, that no conceivable bribe would induce them to accept it. Nor are the word,

and thing, in their real sense, avoidable. The right of litigants is to have justice done according to the true contract between them; and that in each of these Scottish litigations the contract was, in the meaning and intention of the parties, a contract of jurisdiction, was the first and most obvious fact of the case. It was jurisdiction, at the least and lowest; though law may in the future prefer to call it a "prorogated jurisdiction" rather than a consensual. But in the Skerret case, though that was the first, it was by no means the only fact. There were things of importance on both sides, which were only to be got at through the acknowledgment of this earlier one. Thus Mr Skerret's main contention was, that though he might have acknowledged the jurisdiction, and even the exclusive jurisdiction, of his Church and its courts, he on his side had a right to the exercise of that jurisdiction by its courts as constituted, and especially by the Supreme Court or Synod. But that Court, instead of judging the grave cause on which his ministerial status depended, had remitted the whole matter to a committee, and had delegated to it judicial powers which the Synod "had no authority" to give, being bound itself to exercise them. This is a serious question, and one which the first obvious step of justice, the admission of a contract of jurisdiction with the Synod, by no means solves. Even in America,[1] where the courts have no motive for ignoring the constitution of the Churches around them, such an admission does not solve it. A quarter of a century ago, a judge of the Supreme Court of the United States, Mr Justice Strong, in dealing with the Presbyterian Churches there, summed up the United States law as to Voluntary Church tribunals in this way:—

"Whenever questions of discipline, of faith, of Church rule, of membership, or of office, have been decided by the Church in its own modes of decision, civil law tribunals accept the decisions as final, and apply them as made."

[1] See pp. 301, 302.

But having said so, he went on to state, as a question then pending in America and waiting solution :—

"Can a civil court inquire and determine for itself whether a Church judicatory was properly constituted in accordance with the established order of the Church organisation, and can it disregard its decisions if, in its opinion, the judicatory appears not to have been thus constituted ?"

Now this was exactly the question raised, but not decided, in the Skerret case; and it is a very interesting and important one. It is not properly a question of ecclesiastical jurisdiction; it is rather a question of ecclesiastical legislation—of that "government" or autonomy which the Confession of Faith of the Church in question claims as coming to it from another power than the State, and of which the jurisdiction of the Church courts is merely an incident or a corollary. But it is impossible to approach a real question such as creating a new judicatory always proposes, until the law has swept from its threshold more easy and obvious ambiguities. Had this futile action of Mr Skerret's been an action of damages (and the law is bound to provide a form by which such a claim, when it is a just one, may be effectually brought); had it started with the admission that the contract was one of Church jurisdiction and—higher still—of submission to Church government and to legislative autonomy,—there would still have remained the two questions which an appellant has an interest and a right to urge—first, Whether such an autonomy included the power to change the judicial tribunal of the Church ? secondly, Whether, if that power existed, it had been in point of fact now exercised, and exercised by the parties authorised and in the proper way ?

But this is only one specimen of the sort of question which should have been before now considered by the courts of Scotland, as of every predominantly Presbyterian country—questions which American law has long ago been free to discuss, while that of Scotland, if it is free to do

so, is at least not ready. A few of these unsettled questions may be mentioned by way of illustration—some of them easy enough to decide, while others may be found more difficult. (Some, indeed, will be found already hidden away in the convolutions of the two able and intricate judgments pronounced by the Lord Ordinary in this Skerret case — judgments which, as "anticipatory" and speculative, were not adopted as law in the Inner House, but which will well repay study.[1]) Such questions are these :—

1. Whether the contract of jurisdiction claimed by these Churches does not cover all questions of form and method of procedure ?
2. Whether it does not bar all actions of reduction—*i.e.*, actions brought against the Church court itself or to reverse its judgment, as distinguished from actions against individuals ?
3. Whether it does not meet actions even against individuals who have honestly, though mistakenly, exercised the jurisdiction — meet them, that is, unless it is offered to prove malice ?
4. Whether all this (if true as to the jurisdiction of Church courts) does not apply also to the larger sphere of the Church itself and its legislation, in doctrine, discipline, and worship—*i.e.*, to a legislative mistake, honestly made by those to whom the contract commits the duty in such matters of legislative action ?

[1] Lord Kincairney finally threw out the action on the ground that the remedy sought—the reinstatement of the pursuer in his ministry—was not one which could be granted to the minister of a Voluntary Church. This is in accordance with the view of Lord Colonsay, and even of Lord Deas, one of whom indicated that the Court would not replace a leg, though they might give compensation for its loss, and the other that they would not force a tutor on a household, though they might give damages for his wrongous dismissal. The Inner House, however, avoided confirming the general basis of the Lord Ordinary's judgment, rejecting the action on the prior ground of its form.

5. Whether generally,[1] when a Church has (in the words of the Privy Council judgment)[2] "constituted a tribunal to determine whether the rules of the association have been violated by any of its members, or not," the decisions of such tribunal should be held binding by the courts of law: and if so, whether they should be held binding as to "what shall be the consequences of such violation" —in particular, the civil consequences?

The undignified scramble out of the Cardross case at its close[3] may no doubt excuse any supreme court from entering into another which, having the same form, may expose it to similar risks. But the Court had in the Skerret case, what at the time of the Cardross case were not yet in existence, the general principles laid down by the House of Lords in 1867 in Forbes *v.* Eden. And in the case in 1896 the Church defending was eminently one of those whose right of legislation, and of constitutional change, fell to be dealt with on the broad principles recognised by the Court of Appeal—not merely because it had historically aimed at that freedom, and parted with all else to buy it, but because the right of self-government in the

[1] Under Nos. 4 or 5 of these suggestions may fall what Lord Maclaren put on the Bench as the "obvious answer" to Mr Skerret—that he did not appeal from the Church's irregular commission to the Church or its Supreme Court itself. He would thus have exhausted his legitimate remedies before attempting one against which he had apparently bound himself. At least Lord Kincairney holds that "the rules of the association prohibiting appeals to the civil courts were perfectly lawful;" and the ground on which he, notwithstanding, admitted an appeal in this case seems cut away by Lord Maclaren's remark in the Inner House. But Lord Kincairney's initial difficulty in this case was the still more obvious contract of jurisdiction, the ignoring of which made it necessary for him to do justice *per ambages*.

[2] See p. 274. The Privy Council rule, and that of American law (p. 302), seem to be nearly that embodied in the new constitution of the United Free Church. It provides for "the inherent liberty of the United Church, as a Church of Christ, to determine and regulate its own constitution and laws as duty may require, in dependence on the grace of God and under the guidance of His Word."

[3] P. 270.

sense of legislative autonomy, and the exercise of jurisdiction as a sequel and detail of that higher right, were sufficiently indicated in the documents referred to by both parties as forming the contract in the cause.

Lord President Robertson, who had given the cautious leading opinion in this case, was called upon, before being transferred to the House of Lords, to deliver the judgment of the Court in another Ferguson Bequest litigation [1] (Pet. The Ferguson Bequest *v.* The Congregational Union, &c.) It is refreshing, after the endless conflicts of Presbyterianism, to find at last one question which is purely Congregational. The donor in this case, himself a Presbyterian, had in 1856 left his money to be used for the purposes of four Scottish Churches of that family, and, fifthly, of "the Congregational or Independent Church in Scotland." The designation, the President pointed out, is inaccurate. There was no such Church, only an aggregation of churches, united by the "very loose federal tie" of a Church and Mission Society. It was called a Union, indeed, but was expressly declared not to be a Church, and to have no control over the separate congregations. At the same time, there was no doubt what Mr Ferguson meant in his will: at that time this was "a perfectly well-known and definite denomination," predominantly Calvinistic in doctrine. There was at the same time another body in Scotland, called the Evangelical Union, who were formed some sixty years ago on a doctrinal basis which negatived the Calvinistic doctrine of election. They also were congregational and independent, and forty years after Mr Ferguson's bequest was made, in the year 1896, the two Unions agreed to become one. But a minority of the "Congregational Union" objected, on the somewhat slender ground of a prefatory note to the union documents which seemed to commit the parties to the statement that "God had made provision for, and was seeking the salvation of, all men." This, the minority held, was

[1] Fraser, 1224, 6th Dec. 1898 (reported 20th July 1899).

equivalent to a common creed, which their communion always declined, and it was even an anti-Calvinistic creed. Accordingly they seceded (when the others united), and claimed to be the real and only legatees intended by Mr Ferguson. On the other hand, the united body claimed this character for all now gathered within their composite Union.

The Court held, first, that (the Evangelical Union being a well-known body in Mr Ferguson's time, and a body which, though it happened to be congregational in constitution, was not known or named by that circumstance) he must be held to have intentionally passed it over, and to have intentionally selected those whom he (with sufficient accuracy) then named as the Congregational Church. Before the union, therefore, the Evangelical Union congregations could not share in the bequest. If so, why should they do so now? They are still congregations as before—the tie of a loose union did not, in the view of the Lord President, change the identity of the two bodies. Those who were excluded before, the Court held, should be excluded still. On the other hand, those who were included in the bequest before should still share in the old bequest, although they have split asunder, some to work with outsiders, and others to form a rival union. Lastly, the new congregations which may be added to the now composite Union by gradual growth from time to time, and not by formal union of a body from outside, may also share, and on the same general principle. In this case we seem again to observe the reluctance of our later law to take away Church funds from those who have already on just grounds enjoyed them, even when unions and secessions have divided men who previously worked together—the same tendency which in the previous Ferguson case led Lord President Inglis to treat as Congregationalists (to the scandal even of the litigants preferred) the oldest and straitest sect of our Presbytery.[1]

[1] We may take the opportunity of mentioning two earlier Congregational cases, in which the questions only affected the congregation itself. In Connell (1861, 23 D. 683) the members of such a local society having

The closing nineteenth century witnessed the greatest CHURCH UNION which has taken place in Scotland for a thousand years. As a Presbyterian union it was as nearly complete as any Scottish union outside of establishment can hope to be. And the long delay, which ensured this, made two things also certain with regard to the only great body not included — viz., the Church of Scotland. The uniting Churches could have no hope of incorporation with it in the mean time. A few years before it had declined to include the ground on which they stood among even the alternatives of conference. And yet at no epoch during the last sixty years had it come so near in principle to the adoption of that very ground as it did in 1898 and 1900. There was no reason, therefore, why they should farther postpone their action. The new negotiations were started in the Free Church by Dr Ross Taylor and other representatives of the west of Scotland. But they were broadened into a demand for incorporation by the United Presbyterian Church; and the statement and unfolding of the terms on which incorporation might be effected fell throughout chiefly into the hands of Principal Rainy. These terms may be put in a sentence. There was to be no Basis of Union, no Articles of Agreement, no new constitution for the new Church: the two bodies were simply to unite *as they were*. Simple and large as this

contributed funds to erect a church, and afterwards having divided and separated, the minority claimed that their subscriptions should be returned. It was held *then*, that in the circumstances the majority was entitled to apply the whole funds to the building of the church. And in Thomson, 14 Rettie, 1026, it was held that there was no failure of trust objects such as to warrant diversion or division of the congregational funds. The case of Burnett in the following year (15 Rettie, 723) was also one of congregational funds, though not in the Congregational body, and here again the leading opinion was delivered by Lord Robertson. It was held that property left to an ancient Episcopal congregation did not pass with most of its members when they joined a Relief (Presbyterian) Church, but should be given to a modern Episcopal Church which had arisen in the same town.

idea was; it of course left innumerable details to be arranged — though it made it possible in most cases to arrange these either before the incorporation or after, as might seem convenient. Of all the arrangements, probably the most important—certainly the most important for the purposes of this volume—was that as to subscription and creed. And even this was only important for the future. For when Churches unite as they are, each accepts the existing subscription of the other, and those who are already ministers or elders are not asked to subscribe over again. It is only future candidates for office in the united Church for whom provision has to be made. In the present case, with two Churches so near each other, and each emphasising the general right to revise their Confession which is claimed by free Presbyterians throughout the world, there was little difficulty as to *doctrine*. The side on which more apprehension was felt was as to the references in the subscription of both Churches to their separate historical origin. Fortunately, however, this also turned out unexpectedly easy, as a result of the forethought or self-restraint in 1846 of the founders of the Free Church. They then took their future ministers bound not to everything in the Church's recent Claim and Protest, but only to "the general principles embodied in them," and to these only as declaring true views, not on all subjects, but "with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her only standard." The moment this was broadly looked at, the difficulty vanished. For if, as the United Presbyterian Committee were satisfied, the future candidates for office of their communion would have no difficulty in accepting this guarded approbation of general principles, as found in the documents of the Free Church, still less would the rising sons of the Free Church hesitate to accept in the same words the very same principles, as found in the Basis of Union of 1847

—the fundamental document of the United Presbyterian Church.[1] These two formulæ of subscription were accordingly joined into one by a process of simple carpentry, amid universal approval. The others occasioned less difficulty, the aim being always to unite what was admitted as good on either side, and not in the mean time to attempt an ideal *tertium quid*. The chief result will be found in Appendix E to this Second Book.

These proposals and the Uniting Act were sent down through the Churches according to the arrangements for publicity, provided in the Free Church by the Barrier Act and by the Trust-Deed provision for a "united body of Christians," and in the United Presbyterian Church still more fully and effectually. And the Union was finally carried through at a great meeting held in the Waverley Market in Edinburgh on 31st October 1900.

The Uniting Act proceeds upon a historical preamble or narrative of which the following are the most significant clauses. It is recalled that both Churches had Committees for Union which met for years, and that

> Whereas these Committees having met and communicated to one another the existing doctrinal standards, rules, and methods of the two Churches, it appeared that in regard to doctrine, government, discipline, and worship therein set forth, a remarkable and happy agreement obtained between them, as also in particular in the views of the two Churches with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her supreme standard, and that an incorporating union might harmoniously be accomplished: and whereas Questions and a Formula to be used at ordination and induction, as also arrangements for the support and training of the ministry and for combining the methods and work of the two Churches, have been agreed upon, and have been considered by the inferior courts of the two Churches.

Other provisions and proposals are then enumerated, all forming

[1] For Basis of Union see Appendix C. The Free Church documents have been given in Appendix K to Book I., pp. 176-187.

a plan to come into operation as soon as a Uniting Act shall have been passed, . . . it being understood that the united Church may be declared to consist of the Free Church of Scotland as existing previously to the Union, and the United Presbyterian Church as existing previously to the Union, under such common designation as may be agreed upon.

And then follows the final and operative part of the Act itself:—

"And WHEREAS in this month of October [1900] the General Assembly of the Free Church of Scotland, with consent of a majority of presbyteries, and the Synod of the United Presbyterian Church, have now sanctioned the form of a Uniting Act, and also adopted the aforesaid Declarations, and having now severally passed all Acts necessary for the consummation of the Union on the terms agreed upon, have severally resolved to meet together for that purpose, and are now met accordingly;

"Now, therefore, the said General Assembly of the Free Church of Scotland and the Synod of the United Presbyterian Church thus met, first of all desire to express their devout thankfulness to the great Head of the Church for the spirit of love and concord which has prevailed during those negotiations for Union; humbly acknowledge their entire dependence on the mercy of God for all the happy results which they hope for in connection with it; and entreat the divine blessing on the step now to be taken, and on all the congregations and people under their charge;

AND

the General Assembly of the Free Church of Scotland, and the Synod of the United Presbyterian Church, empowered as aforesaid, do hereby, in terms and in pursuance of the deliverances of their respective Church courts, enact and declare that the Free Church of Scotland and the United Presbyterian Church do and shall henceforth constitute one united Church; that the name of the united Church shall be The United Free Church of Scotland, and that its

Supreme Court shall be designated The General Assembly of the United Free Church of Scotland."

This Uniting Act must be considered in connection with the following Declarations adopted by each Church in prospect of it, and passed under the provisions of the Barrier Act or otherwise so as to make them legislative Acts of the Church, and not mere resolutions of Synod or Assembly :—

That the Church enters into this Union and authorises it in view of the following express Declarations, viz.:—

1. The various matters of agreement between the Churches with a view to Union are accepted and enacted without prejudice to the inherent liberty of the United Church, as a Church of Christ, to determine and regulate its own constitution and laws as duty may require, in dependence on the grace of God and under the guidance of His Word.

2. The Larger and Shorter Catechisms of the Westminster Assembly, received and sanctioned by the General Assembly of 1648, and heretofore enumerated among the doctrinal standards of the United Presbyterian Church, continue to be received in the United Church as manuals of religious instruction long approved, and held in honour by the people of both Churches.

3. As this Union takes place on the footing of maintaining the liberty of judgment and action heretofore recognised in either of the Churches uniting, so, in particular, it is hereby declared that members of both Churches, and also of all Churches which in time past have united with either of them, shall have full right, as they see cause, to assert and maintain the views of truth and duty which they had liberty to maintain in the said Churches.

4. While thankfully owning the goodness of God in time past, in moving the hearts of their people to provide means for carrying on the work of the Gospel, the Churches in entering into Union, and under a sense of their present and future responsibilities as a Church of Christ, desire afresh to acknowledge the obligation resting on the Church to labour for the universal diffusion of the Gospel, and the duty of its members to contribute, according to their ability, for the support of the Gospel and the extension of the cause of Christ throughout the world.

With regard to this great Union, two things seem important in view of the history of the law which we are now to conclude.

I. It will be observed that though it was provided beforehand that the united Church might be declared to consist of the Free Church "as existing previously to the Union," and the United Presbyterian Church "as existing previously to the Union," this clause (borrowed from the form which had been used in previous unions of Churches in 1840 and 1876) is not repeated in the Uniting Act itself. The most important part of it is no doubt preserved in the Third Declaration of the two Churches, which emphasises the fact that this is a union of two Churches which have agreed to join as they are. The main result, and at the same time the most obvious result, of that is, that members of either Church have the same liberty "to assert their views of truth and duty" which they had before. And this is extended backwards to the membership of earlier unions. For the United Presbyterian Church is itself notoriously the product of a union of two long-separated Churches, which had separate origins at different dates; and the Free Church was only able to unite with the ancient Cameronians or Reformed Presbyterians on agreeing to their stipulation that the Church after 1876 should consist of the two bodies, with an equal right to the members of each to assert their own views within the united communion. Practically, indeed, the range of individual freedom, after every tolerably equal incorporation, is found to be not less than it was before, but considerably greater.

"Rivers blent take in a broader heaven,"

and reflect the hues of the ampler sky which they behold; while each drop of either stream is now free to flow over and fertilise some strip of earth from which it was before debarred. But when this individual freedom has been provided for, not much more can be done, and there is always a legal puzzle in the question of incorporation and identity. In a literal sense it is impossible that after any incorporating union either of the two bodies forming it should exist as previously to the union. A thousand

changes of relation are necessary, and a thousand others are appropriate and expedient, even when the incorporation is planned in the most cautious way and on the principle of uniting "as you are." But if the incorporation of Presbyterian Churches is called for by their principle, as it undoubtedly is, their moral and legal identity is *preserved* by the very act which terminates their separate existence. And the law must find some means of solving its own paradox unless it is to do intentional injustice. In the present case it is not likely to find difficulty on this head, for the Churches concerned have given it the kind of help which was occasionally much needed in the past.[1] The United Presbyterian Church, during its great half century, was a mere link in a chain and progress of enlarging unions which are not yet complete. And the Free Church, which in 1843 had more temptations to isolation, brushed them all away when in the following year it put its property in trust for itself and for "any united body of Christians" to be formed in the future with other Christians whom it should associate with itself. The law of Scotland will thus on this occasion have the fundamental Presbyterian obligation of union worthily presented to it. But whether this particular union is a legitimate application of that fundamental principle is of course another question, and it has already been raised in court.

II. The first of the Declarations deserves its place, for it is of importance for the future. The law of Scotland, like the law of some other countries, tends to hold that whatever is original to a Church is also fundamental to it. Lord Eldon's Craigdallie judgment is a sufficient illustration of this. It is an absurd principle in any case, but it is especially dangerous when the "origin" of the Church so dealt with is a union of two others—most of all when it is not to be a union on some new and ideal plan, but a union of the Churches "as they are." Even in such a case there must be a "plan of union," and innumerable "matters of agreement are accepted and enacted" to start

[1] Pp. 250, 256, 261.

the new organism on its career of life. But the plan of union is not to be a fetter for the future. In this particular union it is well known that many things were settled by way of intermediate arrangement, and as a compromise between the views or methods of the two Churches,—all being agreed that on such matters some still better result —some ideal result perhaps—should later on be aimed at, but that the attainment of this will require time, and that it was better not "to swap horses while crossing streams." In view of all this the First Declaration enacts nothing positive or new (as indeed none of the others do), but it is a protest of the Church and a declaration of its freedom for the future on the most important matters—its own constitution and laws. These it is free to determine and regulate in time to come as duty may require, such a freedom being in its view inherent in a Church of Christ, and to be exercised therefore only in dependence on the grace of God and the guidance of His Word. This liberty to deal with the laws and constitution of the Church as duty may from time to time require was always, in the view of both the uniting Churches, part of their church privilege or duty. But in the past history of both of them it has been occasionally, if not imperilled, at least threatened or questioned; and accordingly in this union it is made matter of express and fundamental declaration.

The action which followed the Union,[1] at the instance of the comparatively small number of members of the Free Church who refused to unite, is on the whole worthy of its distinguished place in Church litigation. It is for a big sum of money, and would thus be interesting even if it involved no points of law. But there are few points in the long history which we have reviewed which *may* not find a place in its discussion. It includes the very earliest differ-

[1] Bannatyne and others (Free Church of Scotland) against Lord Overtoun and others (General Trustees for Free Church of Scotland, and also General Trustees for the United Free Church of Scotland). Summons dated 14th Dec. 1900.

ences between Old Light and New Light in congregational cases such as Bristo[1] and Craigdallie,[2] and in some respects it is on all fours with the later cases, also congregational, of Kirkintilloch[3] and Thurso.[4] But it is an action not against a congregation, but against a whole Church and its supreme legislative authority, as in the case of Forbes *v.* Eden;[5] and while the defence may be made to rest on general provisions for constitutional change, as in the Cameronian case[6] and that of Skerret,[7] it might have to fall back on the "Declaratory" treatment of the Confession suggested by the Scottish Bench in the Campbeltown case,[8] and upon the twofold presumption, in favour of legislation when carried out by the Church's legislative body, and in favour of Union when the obligation to reincorporation has been stamped upon a church even in embryo.

This case does not deal with any part of the real property —the churches or manses—of the Free Church. For almost all of these have in terms of its Trust-Deed been since 1844 in the hands of local trustees for any united body of Christians which might be formed by association with itself. This leaves very little question now except that of possession under it; and accordingly in several possessory actions as to particular churches (brought from different sides but all before Lord Low) the judge had no difficulty in finding that the Union in 1900 was on the face of it the kind of case the deed had in view. But the General Trustees of the Free Church—those who hold its money accumulations and central property as distinguished from the property of separate congregations—were appointed from time to time without the safeguard of the clause in the Model Trust-Deed, and the opportunity has been quite fairly taken to test the right to this huge amount of unprotected funds. The action is in form a Declarator: *i.e.*, it asks the Court

[1] P. 216.
[2] P. 229. (Judgment of case.)
[3] P. 256.
[4] P. 260.
[5] Pp. 277-286.
[6] P. 295.
[7] P. 304.
[8] Pp. 238, 239.

to declare, *first*, that the General Trustees have held the money for the Free Church and cannot divert it; that the United Free Church does not maintain intact the fundamental principles of the Free Church, and that neither it nor its members have any right to the money or its use, while the pursuers are and represent the Free Church, and are entitled to have the whole of the funds in question; "*or otherwise* and as alternative to the foregoing conclusions," that at least the pursuers have not, by separating themselves from the uniting majority, lost or forfeited the right to their share of these funds, "in such proportion and upon such conditions" as the Court may fix. A conclusion follows for interdict, and for reduction (*i.e.*, the annulling), if need be, of the deeds carrying out the Union and the transfer of the money.

The following seems to be the most important statement in the well-drawn "condescendence" by which those conclusions are supported:—

One of the essential principles recognised by those who associated themselves to form the Free Church of Scotland, emphasised by their leaders in their utterances at the time of the Disruption, and embodied in the contract of association or constitution of said Church as hereinbefore defined, is that it is the duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word; and the said Church as originally associated recognised and maintained the propriety and advantage of the endowment of pastoral charges and the promotion of religious education by the State. The principle of the duty of the recognition of religion by the State by means of the establishment and, where possible, endowment of a national church, was moreover implicitly involved in the position claimed by the Free Church as being the Church of Scotland freed merely from the control of the civil courts in matters spiritual. The said principle formed an essential principle of the Free Church of Scotland, and its maintenance was one of the main reasons for the formation of that Church as a separate association or body of Christians, distinct and apart from those who professed themselves to be "voluntaries." There were several such associations of seceders from the Established Church of Scotland in existence at the time of the Disruption of 1843, holding views practically identical with those of the founders of the Free Church in matters of doctrine and as to the

encroachments of the civil courts, but differing from them as regarded the duty above referred to. In regard to this, these bodies were "voluntaries" in the sense of holding such action of the State to be unlawful. The foundation of the Free Church was a protest against the position of such churches on the one hand, just as it was against the encroachments of the civil power on the other.

For many years past there has been a party in the Free Church of Scotland desirous of forming an incorporating Union between that Church and the United Presbyterian Church of Scotland. The latter body is an association or body of Christians maintaining and professing principles which, while in many respects similar to, are upon some points fundamentally different from, those of the Free Church of Scotland. In particular, it is not a principle of the constitution of the said United Presbyterian Church that the civil magistrate has any duty, or even any right, to maintain and support an establishment of religion. Such duty or right was not recognised by said Church. On the contrary, it was negatived by at least one of the bodies which in 1847 united to form that Church. In particular, it was at the time of the negotiations for said Union aftermentioned, an accepted and distinctive principle of the United Presbyterian Church not only that no such duty or right exists, but that it is neither lawful nor expedient for the State to give sanction to any creed in the way of setting up an establishment of religion, nor within its province to provide for the expense of the ministrations of or otherwise to further religion, or even to provide the means of elementary religious education, out of the national resources.

It is perhaps not necessary to give the statement on the other side in which the able counsel for the United Free Church support its view that the above principle "was not a fundamental or integral principle in the constitution of the Free Church, and it has not at any time formed part of the doctrines, articles of faith, tenets, creed, or contract binding upon ministers or other office-bearers or members of the Free Church of Scotland." For after a long and elaborate argument in the summer of 1901 before the Lord Ordinary, Lord Low (without calling for farther inquiry or any evidence other than the facts and documents which both parties admitted) dismissed the whole action on the ground that the pursuers had failed at precisely this point. What they alleged was not, in his view, a fundamental principle originally in the constitution of the Free Church; and at Appendix F to this Book (pp. 343-

354) will be found the remarkably readable as well as weighty Opinion in which the reasons for the judgment were recorded. But this sweeping decision (which gives the pursuers, claiming the whole, no right to even a share of the funds in dispute) has been reclaimed against. And in view of the questions which have chiefly interested us in this volume, it may be well to give the passage in which the United Free Church draws out its farther line of defence, which will have to be discussed by any disposed to hold, against Lord Low, that the view in question was an original tenet of the Church itself (as well as of its leaders) in 1843. It is as follows:—

The Free Church as a voluntary association of persons united together for religious purposes possessed from the beginning the right at common law to control and regulate its own affairs, and, if it saw fit, to change its own doctrines or tenets by virtue of its legislative power inherent in the General Assembly—its Supreme Court—acting by a majority of its members. Further, the Church of Scotland had claimed such right even when in statutory connection with the State, and the Free Church, inasmuch as it claimed to be the historic Church of Scotland, continued after 1843 to exercise said right as a Church separate from the State in terms of the Barrier Act (Act 1697, c. 9). Said Act provides: "The General Assembly, . . . for preventing any sudden alteration or innovation, or other prejudice to the Church, in either doctrine or worship or discipline or government thereof, now happily established, do therefore appoint, enact, and declare that before any General Assembly of this Church shall pass any Acts which are to be binding Rules and Constitutions to the Church, the same Acts be first proposed as Overtures to the Assembly, and being by them passed as such, be remitted to the consideration of the several presbyteries of this Church, and their opinion and consent reported by their commissioners to the next General Assembly following, who may then pass the same in Acts, if the more general opinion of the Church thus had agreed thereunto." According to the view which the Free Church has always taken of this Act, it contemplated that the Church might competently make "alterations or innovations" in doctrine, worship, discipline, or government, and provided means whereby such changes should be carried out only after deliberate procedure, and after full opportunity had been given to the whole Church to express its opinion. When the procedure set forth in the Act had been adopted, an Act of Assembly passed with the approval of a majority of the presbyteries of the Church became a "binding Rule and Constitution of the Church." On the other hand, no Act of Assembly which had not so

obtained the approval of a majority of presbyteries was "a binding Rule and Constitution" of the Church. Prior to the passing of the Barrier Act, the supreme legislative power to innovate upon doctrine, worship, &c., resided in the General Assembly acting by a majority of the members of any single General Assembly. Previous General Assemblies had made fundamental changes in doctrine, &c., by votes of a single Assembly. An illustration of this is the adoption by the Assembly of 1647 of the Westminster Confession of Faith, subject to the declarations in the Act of 1647 (which were never acknowledged by Parliament) as the binding creed of the Church in place of its former Confession. The Barrier Act was a limitation and regulation of the hitherto unlimited powers of any single Assembly to make changes in doctrine, worship, discipline, or government of the Church. The Established Church repeatedly exercised its legislative powers under the Barrier Act. Instances of this are the Declaratory Act as to Parliamentary Churches, 25th May 1833; Declaratory Act as to Chapels of Ease, 31st May 1834, admitting into its own body the pastors of 200 non-parochial congregations; Act, 1st June 1835, putting an end to the appointment of ministers against the veto of a majority of the people, although such appointments had been submitted to for 120 years or thereby under the statute of Queen Anne 1711; Act, 25th May 1839, anent reunion with Seceders, including in its own body the ministers and members of the Original Secession Church. By these and other Acts the Church had changed and modified its own "doctrine or worship or discipline or government." It claimed to exercise the right to do so in virtue of its own independent spiritual jurisdiction and without restraint from the State, even when the Church was in statutory connection with the State. The civil courts refused to acknowledge such rights in the Church, as being inconsistent with the conditions of Establishment, and the Free Church was constituted in order that as a Church apart from and not in alliance with the State it might freely enjoy such rights.[1]

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[1] The following passage from the pursuers' record shows the line which they appear to take against the position quoted above. It mixes up somewhat, however, the objection to unlimited powers of alteration in a Church, or to powers of legislation in grave and constitutional matters, with the old but less respectable idea that a union with change of name must be unanimous, and that a small minority can block it by merely refusing to go in:—

"The pretended Act of Union whereby the majority of the said General Assembly, and those adhering to them, united themselves with the United Presbyterian Church, was void and inhabile to effect any real union between the Free Church of Scotland and the said United Presbyterian Church to the prejudice of the said Free Church and of the pursuers and others seeking to maintain the existence of the said Free Church, and to retain and apply its property

This legislative power of the Church (much more than of the Assembly, which has it only representatively, and under safeguards and limitations) belongs to the general principle dealt with by the House of Lords in 1867. But its application, if needed, would apparently be in the region which was signalised in 1839 by the Lord Justice-Clerk Boyle, Lord Medwyn, Lord Meadowbank, and the Lord Ordinary Moncreiff.

It was stated publicly that the intention of this whole litigation was to secure the minimum—the claim of a seceding minority to its mere proportional share of the money. But this was not confirmed, certainly not in

and funds for the perpetuation of the principles for the maintenance of which the Church was founded, and that in *inter alia* the following respects: The said Act (*first*) pretends to merge the identity of the Free Church of Scotland in a new Church which not merely differs in name, but which does not recognise, and is under no obligation to recognise, the distinctive principles and standards of doctrine hereinbefore mentioned as essential and fundamental in the Free Church constitution or contract; (*second*) the terms of the alleged Act of Union taken in connection with the declarations relative thereto substitute, as the basis of association of the said new United Free Church, a contract which is undefined, and which has deliberately been made susceptible of alteration from time to time at the hands of the General Assembly of the said United Free Church, without any power to a minority to effectively object thereto, for the original definite constitution or contract of association of the Free Church, unalterable in its fundamental principles by any mere majority, however large; (*third*) it provides for admitting to equal rights in the government of the Church, and the management and enjoyment of property held for the distinctive purposes of the Free Church of Scotland, a large body of men who have never accepted and will never be called on to accept the distinctive principles of that Church; (*fourth*) it accords positive recognition to certain Declaratory Acts of the Free Church of Scotland which qualify subscription to the standards of the Free Church of Scotland, and thus abandons the said Confession of Faith as the Church's standard of belief. The said Declaratory Acts and the alterations upon fundamental points of doctrine therein contained did not receive the unanimous assent of the Church, and therefore have never become effectual to affect the constitution of the Church. The said Acts were dissented from, and they have not hitherto been binding on those disapproving of them, no minister of the Free Church having been hitherto at any time bound to put them to those licensed, ordained, or inducted by him. Under the formula of the New Church those invalid Acts are accorded positive recognition, and all ministers are obliged to put them to candidates for licence, ordination, &c.; (*fifth*), sub-

the pleadings as reported; and the alternative conclusions of the summons (which are quite usual in practice) may represent different views and feelings in the body of pursuers.

The various course of the law of Scotland, in dealing with the Church outside Establishment, recalls the suggestion of our Preface that its principles on this matter are even yet not quite settled. But that course, certainly unduly protracted, seems to have carried it at last past the chief dangers of the way. And we may look forward now to the important work of the building up of those principles without deviation or delay, perhaps upon native Scottish lines.

scription to the standards is further qualified by reference to a Declaratory Act of the United Presbyterian Church (1879), which is not a law of the Free Church at all, and to a document — the Basis of Union of the United Presbyterian Church of 13th May 1847—which not only is not part of the constitution of the Free Church, but is antagonistic to its principles, and ministers are required to put these also to candidates for ordination," &c.

It should be added that the pursuers base their action on "a definite contract" constituted by the Documents of 1843 "and the Acts of Assembly of the Church of Scotland, in so far as not modified thereby"—*i.e.*, by the said Documents. They seem to avoid, however, saying that all that was in this original complex is unalterable: alleging rather that there is no provision "for any alteration being made in *the essential principles* of the said constitution and standard of belief" by any "mere majority, however large" (cond. 10 and 11).

APPENDIX TO BOOK II.

A.

THE SCOTTISH TOLERATION ACT [OF EPISCOPACY].

An Act to prevent the Disturbing those of the Episcopal Communion in that part of Great Britain called Scotland, in the Exercise of their religious Worship, and in the use of the Liturgy of the Church of England; and for repealing the Act passed in the Parliament of Scotland, intituled An Act against irregular Baptisms and Marriages. (10th of Anne, cap. 7, A.D. 1711.)

Whereas, since the abolishing of Episcopal government in Scotland, those of the Episcopal persuasion there have been frequently disturbed and interrupted in their religious assemblies, and their ministers prosecuted for reading the English service in their congregations, and for administering the sacraments according to the form and manner prescribed in the Liturgy of the Church of England: Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and the Commons, in this present Parliament assembled, and by the authority of the same, that it shall be free and lawful for all those of the Episcopal communion in that part of Great Britain called Scotland, to meet and assemble for the exercise of divine worship, to be performed after their own manner by pastors ordained by a Protestant bishop, and who are not established ministers of any church or parish, and to use in their congregations the Liturgy of the Church of England, if they think fit, without any let, hindrance, or disturbance from any person whatsoever; and all Sheriffs of Shires, Stewards of Stewartries, and Magistrates of Boroughs, and Justices of the Peace, are hereby strictly required to give all manner of protection, aid, and assistance to such Episcopal ministers, and those of their own communion, in

their meetings and assemblies for the worship of God, held in any town or place, except parish churches, within the extent and jurisdiction of that part of Great Britain called Scotland.

II. Provided always, and be it enacted by the authority aforesaid, that none shall presume to exercise the function of a pastor in the said Episcopal meetings and congregations, except such as shall have received holy orders from the hands of a Protestant bishop ; and that every person who shall be called or appointed to be a pastor or minister of any Episcopal congregation or assembly, before he take upon him to officiate as pastor of the said congregation, be hereby obliged and required to present his letters of orders to the Justices of Peace, at their General or Quarter Sessions to be held for the shire, stewartry, city, town, or other place in which the said Episcopal congregation is or shall be ; and that the said letters of orders be there entered on record by the register or clerk of the said meeting of the justices, for which there shall be no greater fee or reward taken than the sum of one shilling.

III. And be it further enacted by the authority aforesaid, that all ministers of the Established Church of Scotland, and all and every person and persons, who is or are pastor or pastors, minister or ministers, of any Episcopal congregation in Scotland, shall be obliged and are hereby required, on or before the first day of August next, to come to take and subscribe the following oaths, in such manner and under such penalties as all officers, civil and military, in Scotland are obliged to take the oath recited in the fourteenth Act of the sixth year of her majesty's reign, intituled An Act for the better Security of her Majesty's Person and Government ; and that all ministers of the Established Church of Scotland, hereafter to be admitted into their respective churches or benefices, and all and every person and persons, who shall hereafter be pastor or pastors, minister or ministers of any Episcopal congregation, shall, before such admission or exercise of their respective functions, be obliged to take and subscribe likewise the following oaths, in the same manner, and under the same penalties above mentioned : "I, A. B., do sincerely promise and swear that I will be faithful, and bear true allegiance to her majesty Queen Anne. So help me God." "I, A. B., do truly and sincerely acknowledge, profess, testify, and declare, in my conscience before God and the world, that our sovereign lady Queen Anne is lawful and rightful queen of this realm, and of all other her majesty's dominions and countries thereunto belonging. . . . And all these things I do plainly and sincerely acknowledge and swear, according to these express words by me spoken, and according to the plain and common sense and understanding of the same words, without any equivocation, mental evasion, or secret reservation whatsoever. And I do make

this recognition, acknowledgment, adjuration, renunciation, and promise, heartily, willingly, and truly, upon the true faith of a Christian. So help me God."

IV. Provided always, that the assemblies of persons for religious worship in the Episcopal meetings be held with doors not locked, barred, or bolted during such assembly; and that nothing herein contained shall be construed to exempt any of the persons frequenting the said Episcopal congregations from paying of tithes or other parochial duties to the church or minister of the parish to which they belong and in which they reside.

V. And whereas since the establishment of the Presbyterian government in Scotland, some laws have been made by the Parliament in Scotland against the Episcopal clergy of that part of the United Kingdom, and particularly an Act passed in the Parliament held in the year one thousand six hundred and ninety-five, intituled Act against irregular Baptisms and Marriages, by which all Episcopal ministers, who were turned out of their churches, are prohibited to baptise any children, or to solemnise any marriage, upon pain of perpetual imprisonment or banishment: Be it therefore enacted by the authority aforesaid, that the said Act above mentioned be hereby repealed and annulled; and that in all time coming no person or persons shall incur any disability, forfeiture, or penalty whatsoever upon account of his or their resorting to the said Episcopal meetings held for the worship of God; and that it shall be free and lawful for all the subjects in that part of Great Britain called Scotland to assemble and meet together for divine service without any disturbance, and to settle their congregations in what towns or places they shall think fit to chuse, except parish churches, and for the Episcopal ministers not only to pray and preach in the Episcopal congregations, but to administer the sacraments, and marry without incurring any pain or penalty, any law or statute to the contrary notwithstanding.

VI. Provided always, that the parents who have their children christened by Episcopal ministers be hereby obliged to enter the birth and christening of their children in the register-books for christenings belonging to the respective parishes in which they live; and provided likewise, that no Episcopal minister or ministers residing within that part of the United Kingdom called Scotland presume to marry any persons but those whose bans have been duly published three several Lord's days in the Episcopal congregations which the two parties frequent, and in the churches to which they belong as parishioners, by virtue of their residence; and that upon the same pains and punishments as are already inflicted by the laws of Scotland in cases of clandestine marriages, and the ministers of the parish churches are hereby obliged to publish the said bans; and in case of neglect or

refusal, it shall be sufficient to publish the said bans in any Episcopal congregation alone, any law, statute, or custom to the contrary notwithstanding.

VII. Provided always, and it is the true intent and meaning of this Act, that all the laws made against prophaneness and immorality, and for the frequenting of divine services on the Lord's day, commonly called Sunday, shall be still in force, and executed against all persons that offend against the said laws, or shall not resort to some church, or to some congregation or assembly of religious worship allowed and permitted by this Act.

VIII. Provided likewise, that neither this Act nor any clause, article, or thing herein contained, shall extend, or be construed to extend, to give any ease, benefit, or advantage to any Papist or Popish recusant whatsoever, or to any person that shall deny in his preaching or writing the doctrine of the blessed Trinity.

IX. And be it further enacted by the authority aforesaid, that if any person or persons, at any time after the twenty-fifth day of March next to come, shall willingly and of purpose, maliciously or contemptuously, come into any congregation or assembly of religious worship permitted by this Act, and disquiet or disturb the same, or give any disturbance to the said congregation at the doors or windows, or misuse any minister or pastor of such congregation, such person or persons, on proof thereof before two Justices of the Peace, by two or more sufficient witnesses, shall find two sureties to be bound by recognisance in the penal sum of fifty pounds sterling, for his or their appearance at the next General or Quarter Sessions, or before the Court of Justiciary, or other judge or judges competent, and in default of such sureties shall be committed to prison, and upon conviction of the said offence at the said General or Quarter Sessions, or before the said Court of Justiciary, or other judge or judges competent, shall forfeit the sum of one hundred pounds sterling; one moiety thereof to the informer, the other to be disposed of for the use of the poor of the parish where such offence shall be committed: and if the magistrates of any town or place, or others pretending to have authority or jurisdiction any where in Scotland, shall, in contempt of this law, forbid or hinder those of the Episcopal persuasion from meeting or assembling together for divine worship in the places subject to their jurisdiction, or shall shut up or cause to be shut up the doors of the houses or other places where such Episcopal assemblies are held, or intended to be held, such magistrates or others so offending, upon proof thereof before the Court of Justiciary, by two or more sufficient witnesses, shall forfeit the sum of one hundred pounds sterling, to be distributed as aforesaid.

X. And be it further declared and enacted by the authority afore-

said, that no civil pain or forfeiture, or disability whatsoever, shall be in any ways incurred by any person or persons, by reason of any excommunication or prosecution in order to excommunication by the Church judicatories, in that part of Great Britain called Scotland; and all civil magistrates are hereby expressly prohibited and discharged to force or compel any person or persons to appear when summoned, or to give obedience to such sentence when pronounced, any law or custom to the contrary notwithstanding.

XI. And be it further enacted by the authority aforesaid, that every minister and preacher, as well of the Established Church in that part of Great Britain called Scotland as those of the Episcopal communion protected and allowed by this Act, shall, at some time during the exercise of the divine service in such respective church, congregation, or assembly, pray in express words for her most sacred majesty Queen Anne, and the most excellent Princess Sophia, Electress and Duchess-dowager of Hanover, whilst living, and all the royal family. And every such minister or preacher neglecting to do so, shall for the first offence forfeit the sum of twenty pounds sterling, to be recovered and distributed in such manner as touching the other penalties in this Act is hereinbefore directed: and for the second offence every minister of the Established Church in that part of Great Britain called Scotland, being thereof convicted by the oaths of two sufficient witnesses before the Lords of Justiciary, shall be *ipso facto* deprived, and declared incapable of any church or ecclesiastical living during the space of three years; and every Episcopal minister allowed and protected by this Act, being thereof in like manner convicted, shall from thenceforth forfeit and lose the benefit of this Act, and be declared incapable of officiating as pastor of any Episcopal congregation during the space of three years.

XII. Provided always, that no minister or preacher offending herein shall suffer such penalties, or either of them, unless he be prosecuted for the same within the space of two months after the offence is committed.

B.

ACT XII. 1846 OF THE GENERAL ASSEMBLY OF THE FREE CHURCH OF SCOTLAND ANENT QUESTIONS AND FORMULA.

Whereas it has become necessary, in consequence of the late change in the outward condition of the Church, to amend the Questions and Formula to be used at the licensing of probationers, and the ordina-

tion of deacons, elders, and ministers respectively, the General Assembly, with consent of a majority of presbyteries, enact and ordain that the following shall be the Questions so to be used; and considering that the Formula to this Act subjoined embodies the substance of the answers to the said questions, the Assembly appoint the same to be subscribed by all probationers of the Church before receiving licence to preach the Gospel, and by all office-bearers at the time of their admission. And the General Assembly, in passing this Act, think it right to declare that, while the Church firmly maintains the same scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ, for which she has hitherto contended, she disclaims intolerance or persecuting principles, and does not regard her Confession of Faith, or any portion thereof, when fairly interpreted, as favouring intolerance or persecution, or consider that her office-bearers, by subscribing it, profess any principles inconsistent with liberty of conscience and the right of private judgment.

. . . . . .

FORMULA.

(*To be subscribed by Probationers before receiving Licence, and by all Office-bearers at the time of their Admission.*)

I, , do hereby declare that I do sincerely own and believe the whole doctrine contained in the Confession of Faith, approven by former General Assemblies of this Church, to be the truths of God; and I do own the same as the confession of my faith; as likewise I do own the purity of worship presently authorised and practised in the Free Church of Scotland, and also the Presbyterian government and discipline thereof; which doctrine, worship, and church government, I am persuaded, are founded on the Word of God, and agreeable thereto: I also approve of the general principles respecting the jurisdiction of the Church, and her subjection to Christ as her only Head, which are contained in the Claim of Right and in the Protest referred to in the questions already put to me; and I promise that, through the grace of God, I shall firmly and constantly adhere to the same, and to the utmost of my power shall, in my station, assert, maintain, and defend the said doctrine, worship, discipline, and government of this Church, by kirk-sessions, presbyteries, provincial synods, and general assemblies, together with the liberty and exclusive jurisdiction thereof; and that I shall, in my practice, conform myself to the said worship, and submit to the said discipline, government, and exclusive jurisdiction, and not endeavour, directly

or indirectly, the prejudice or subversion of the same; and I promise that I shall follow no divisive course from the doctrine, worship, discipline, government, and exclusive jurisdiction of this Church, renouncing all doctrines, tenets, and opinions whatsoever, contrary to, or inconsistent with, the said doctrine, worship, discipline, government, or jurisdiction of the same.

C.

BASIS OF UNION OF THE UNITED PRESBYTERIAN CHURCH, 1847.

1. That the Word of God, contained in the Scriptures of the Old and New Testaments, is the only rule of faith and practice.

2. That the Westminster Confession of Faith, and the Larger and Shorter Catechisms, are the confession and catechisms of this Church, and contain the authorised exhibition of the sense in which we understand the Holy Scriptures; it being always understood that we do not approve of anything in these documents which teaches, or may be supposed to teach, compulsory or persecuting and intolerant principles in religion.

3. That Presbyterian government, without any superiority of office to that of a teaching presbyter, and in a due subordination of Church courts, which is founded on, and agreeable to, the Word of God, is the government of this Church.

4. That the ordinances of worship shall be administered in the United Church as they have been in both bodies of which it is formed; and that the Westminster Directory of Worship continue to be regarded as a compilation of excellent rules.

5. That the term of membership is a credible profession of the faith of Christ as held by this Church—a profession made with intelligence, and justified by a corresponding character and deportment.

6. That with regard to those ministers and sessions who may think that the 2nd section of the 26th chapter of the Confession of Faith authorises free communion—that is, not loose or indiscriminate communion, but the occasional admission to fellowship in the Lord's Supper of persons respecting whose Christian character satisfactory evidence has been obtained, though belonging to other religious denominations—they shall enjoy in the united body what they enjoyed in their separate communions—the right of acting on their conscientious convictions.

7. That the election of office-bearers of this Church, in its several congregations, belongs, by the authority of Christ, exclusively to the members in full communion.

8. That this Church solemnly recognises the obligation to hold forth, as well as to hold fast, the doctrine and law of Christ, and to make exertions for the universal diffusion of the blessings of His Gospel at home and abroad.

9. That as the Lord hath ordained that they who preach the Gospel should live of the Gospel,—that they who are taught in the Word should communicate to him that teacheth in all good things—that they who are strong should help the weak—and that, having freely received, thus they should freely give the Gospel to those who are destitute of it,—this Church asserts the obligation and the privilege of its members, influenced by regard to the authority of Christ, to support and extend, by voluntary contribution, the ordinances of the Gospel.

10. That the respective bodies of which this Church is composed, without requiring from each other any approval of the steps of procedure by their fathers, or interfering with the rights of private judgment in reference to these, unite in regarding as still valid the reasons on which they have hitherto maintained their state of secession and separation from the judicatories of the Established Church, as expressed in the authorised documents of the respective bodies, and in maintaining the lawfulness and obligation of separation from ecclesiastical bodies in which dangerous error is tolerated, or the discipline of the Church, or the rights of her ministers or members, are disregarded.

D.

UNITED PRESBYTERIAN CHURCH DECLARATORY ACT, 1879.

Whereas the Formula in which the Subordinate Standards of this Church are accepted requires assent to them as an exhibition of the sense in which the Scriptures are understood: Whereas these Standards, being of human composition, are necessarily imper-

FREE CHURCH OF SCOTLAND DECLARATORY ACT, 1892.

Edinburgh, 26*th May* 1892. *Sess.* 13.

Whereas it is expedient to remove difficulties and scruples which have been felt by some in reference to the declaration of belief required from persons who receive licence or are admitted to

fect, and the Church has already allowed exception to be taken to their teaching or supposed teaching on one important subject: And whereas there are other subjects in regard to which it has been found desirable to set forth more fully and clearly the view which the Synod takes of the teaching of Holy Scripture: Therefore the Synod hereby declares as follows :—

1. That in regard to the doctrine of redemption as taught in the Standards, and in consistency therewith, the love of God to all mankind, His gift of His Son to be the propitiation for the sins of the whole world, and the free offer of salvation to men without distinction on the ground of Christ's perfect sacrifice, are matters which have been and continue to be regarded by this Church as vital in the system of Gospel truth, and to which due prominence ought ever to be given.

2. That the doctrine of the divine decrees, including the doctrine of election to eternal life, is held in connection and harmony with the truth that God is not willing that any should perish, but that all should come to repentance, and that He has provided a salvation sufficient for all, adapted to all, and offered to all in the Gospel ; and also with the responsibility of every man for his dealing with the free and unrestricted offer of eternal life.

3. That the doctrine of man's total depravity, and of his loss of office in this Church, the General Assembly, with consent of presbyteries, declare as follows :—

That, in holding and teaching, according to the Confession, the Divine purpose of grace towards those who are saved, and the execution of that purpose in time, this Church most earnestly proclaims, as standing in the forefront of the revelation of Grace, the love of God — Father, Son, and Holy Spirit—to sinners of mankind, manifested especially in the Father's gift of the Son to be the Saviour of the world, in the coming of the Son to offer Himself a Propitiation for sin, and in the striving of the Holy Spirit with men to bring them to repentance.

That this Church also holds that all who hear the Gospel are warranted and required to believe to the saving of their souls ; and that in the case of such as do not believe, but perish in their sins, the issue is due to their own rejection of the Gospel call. That this Church does not teach, and does not regard the Confession as teaching, the foreordination of men to death irrespective of their own sin.

That it is the duty of those who believe, and one end of their calling by God, to make known the Gospel to all men everywhere for the obedience of faith. And that while the Gospel is the ordinary means of salvation for

"all ability of will to any spiritual good accompanying salvation," is not held as implying such a condition of man's nature as would affect his responsibility under the law of God and the Gospel of Christ, or that he does not experience the strivings and restraining influences of the Spirit of God, or that he cannot perform actions in any sense good; although actions which do not spring from a renewed heart are not spiritually good or holy—such as accompany salvation.

4. That while none are saved except through the mediation of Christ and by the grace of His Holy Spirit, who worketh when, and where, and how it pleaseth Him; while the duty of sending the Gospel to the heathen, who are sunk in ignorance, sin, and misery, is clear and imperative; and while the outward and ordinary means of salvation for those capable of being called by the Word are the ordinances of the Gospel: in accepting the Standards, it is not required to be held that any who die in infancy are lost, or that God may not extend His grace to any who are without the pale of ordinary means, as it may seem good in His sight.

5. That in regard to the doctrine of the civil magistrate, and his authority and duty in the sphere of religion as taught in the Standards, this Church holds that the Lord Jesus Christ is the only King and Head of the Church, and "Head over all those to whom it is made known, yet it does not follow, nor is the Confession to be held as teaching, that any who die in infancy are lost, or that God may not extend His mercy, for Christ's sake, and by His Holy Spirit, to those who are beyond the reach of these means, as it may seem good to Him, according to the riches of His grace.

That, in holding and teaching, according to the Confession of Faith, the corruption of man's whole nature as fallen, this Church also maintains that there remain tokens of his greatness as created in the image of God; that he possesses a knowledge of God and of duty; that he is responsible for compliance with the moral law and with the Gospel; and that, although unable without the aid of the Holy Spirit to return to God, he is yet capable of affections and actions which in themselves are virtuous and praiseworthy.

That this Church disclaims intolerant or persecuting principles, and does not consider her office-bearers, in subscribing the Confession, committed to any principles inconsistent with liberty of conscience and the right of private judgment.

That while diversity of opinion is recognised in this Church on such points in the Confession as do not enter into the substance of the Reformed Faith therein set

things to the Church, which is His body"; disapproves of all compulsory or persecuting and intolerant principles in religion; and declares, as hitherto, that she does not require approval of anything in her Standards that teaches, or may be supposed to teach, such principles.

6. That Christ has laid it as a permanent and universal obligation upon His Church, at once to maintain her own ordinances and to "preach the Gospel to every creature"; and has ordained that His people provide by their free-will offerings for the fulfilment of this obligation.

7. That, in accordance with the practice hitherto observed in this Church, liberty of opinion is allowed on such points in the Standards, not entering into the substance of the faith, as the interpretation of the "six days" in the Mosaic account of the creation: the Church guarding against the abuse of this liberty to the injury of its unity and peace.

The following question of the Formula contains the terms in which the Subordinate Standards are accepted by the office-bearers of the Church: "Do you acknowledge the Westminster Confession of Faith and the Larger and Shorter Catechisms as an exhibition of the sense in which you understand the Holy Scriptures, this acknowledgment being made in view of the explanations contained in the Declaratory Act of Synod thereanent?"

forth, the Church retains full authority to determine, in any case which may arise, what points fall within this description, and thus to guard against any abuse of this liberty to the detriment of sound doctrine, or to the injury of her unity and peace.

E.

ACT OF GENERAL ASSEMBLY OF UNITED FREE CHURCH OF SCOTLAND ANENT QUESTIONS AND FORMULA, OCTOBER 1900.

Edinburgh, 31*st October* 1900. *Sess.* 1.

The General Assembly, in accordance with the terms of the Uniting Act, enact and ordain that the following Questions and Formula, considered and agreed upon by the inferior courts of the two Churches, shall be the Questions and Formula to be used at the ordination and induction of ministers and office-bearers in the United Free Church :—

PREAMBLE AND QUESTIONS AT THE ORDINATION OR INDUCTION OF A MINISTER.

PREAMBLE.

(*To be publicly read when the Questions are put.*)

It is hereby declared, that the following questions are put in view of Act 1647, approving of the Confession of Faith ; Act XII. 1846 of the Free Church of Scotland ; Declaratory Act 1879 of the United Presbyterian Church ; and Act XII. 1892, with relative Act of 1894, of the Free Church ; and that ministers are entitled to avail themselves of any of these Acts.

It is hereby also declared, that the documents referred to in question No. 4, and there named for brevity the Claim of Right of 1842, the Protest of 1843, and the Basis of Union of 1847, are respectively the "Claim, Declaration, and Protest adopted by the General Assembly of the Church of Scotland in 1842," and the "Protest of Ministers and Elders, Commissioners from Presbyteries to the General Assembly, read in presence of the Royal Commissioner, on 18th May 1843," and the "Basis of Union adopted by the Synod of the United Presbyterian Church on 13th May 1847."

QUESTIONS.

1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and life?

2. Do you sincerely own and believe the doctrine of this Church, set forth in the Confession of Faith, approven by Acts of General Synods and Assemblies ; do you acknowledge the said doctrine as expressing the sense in which you understand the Holy Scriptures ; and will you

constantly maintain and defend the same, and the purity of worship in accordance therewith?

3. Do you disown all Popish, Arian, Socinian, Arminian, Erastian, and other doctrines, tenets, and opinions whatsoever, contrary to and inconsistent with the said doctrine of this Church?

4. Do you believe that the Lord Jesus Christ, as King and Head of the Church, has therein appointed a government in the hands of church-officers, distinct from, and not subordinate in its own province to, civil government, and that the civil magistrate does not possess jurisdiction or authoritative control over the regulation of the affairs of Christ's Church; and do you approve of the general principles with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her only standard, embodied in the Claim of Right of 1842, the Protest of 1843, and the Basis of Union of 1847, as principles which are sanctioned by the Word of God and the subordinate standards of this Church?

5. Do you acknowledge the Presbyterian government and discipline, as authorised in this Church, to be founded on, and agreeable to, the Word of God; do you promise to maintain, and submit to, the said government and discipline; and, while cherishing a spirit of brotherhood towards all the faithful followers of Christ, do you engage to seek the purity, edification, peace, and extension of this Church?

6. Are not zeal for the glory of God, love to the Lord Jesus Christ, and desire of saving souls, and not worldly designs or interests, so far as you know your own heart, your great motives and chief inducements to enter into the office of the holy ministry?

7. Do you promise to be subject in the Lord to this Presbytery, and to the superior judicatories of this Church, and conscientiously to take your part in their proceedings?

8. Do you engage, in the strength of the grace that is in Jesus Christ, our Lord and Master, to rule well your own house, to live a holy and circumspect life, and faithfully, diligently, and cheerfully to discharge all the parts of the ministerial work, to the edification of the body of Christ?

9. Have you used any undue methods, either by yourself or others, to procure the call of this congregation?

TO THE CONGREGATION.

(The Members of the Church being requested to stand up, this Question is put to them.)

10. Do you, the members of this congregation, testify your adherence to the call which you have given to Mr A. B. to be your minister;

do you receive him with all gladness, and promise to give him all dutiful respect, encouragement, and obedience in the Lord; and do you undertake to contribute heartily, as the Lord shall enable you, for the maintenance of the Christian ministry, and the furtherance of the Gospel?

[*An opportunity is here given to the Members of the Church of signifying their assent to this Question by holding up their right hands.*]

TO THE MINISTER.

11. Do you adhere to your acceptance of the call to be pastor of this congregation, and promise, through grace, to perform all the duties of a faithful minister of the Gospel among this people?

12. And these things you profess and promise through grace, as you would give in your account with joy at the coming of our Lord Jesus Christ, with all His saints, and have an entrance ministered to you abundantly into His everlasting kingdom?

DECLARATION OF ORDINATION OR INDUCTION OF A MINISTER.

Prayer being ended, the Moderator, addressing the Minister-elect, says:—

In the Name of the Lord Jesus Christ, the King and Head of the Church, we do hereby *declare you to be ordained to the office of the holy ministry, and* induct you to the pastoral charge of this congregation; and we commend you to the grace of God in the discharge of all your duties as a minister of the Gospel.

Note.—In the induction of a Minister previously ordained, the words "*declare you to be ordained to the office of the holy ministry, and,*" are omitted.

PREAMBLES AND QUESTIONS AT THE ORDINATION OR INDUCTION OF ELDERS.

PREAMBLE.

(*Same as in case of a Minister.*)

QUESTIONS.

1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and life?

2. Do you sincerely own and believe the doctrine of this Church, set forth in the Confession of Faith, approven by Acts of General Synods and Assemblies; do you acknowledge the said doctrine as expressing the sense in which you understand the Holy Scriptures; and will you constantly maintain and defend the same, and the purity of worship in accordance therewith?

3. Do you believe that the Lord Jesus Christ, as King and Head of the Church, has therein appointed a government in the hands of church-officers, distinct from, and not subordinate in its own province to, civil government, and that the civil magistrate does not possess jurisdiction or authoritative control over the regulation of the affairs of Christ's Church; and do you approve of the general principles with respect to the spirituality and freedom of the Church of Christ, and her subjection to Him as her only Head, and to His Word as her only standard, embodied in the Claim of Right of 1842, the Protest of 1843, and the Basis of the Union of 1847, as principles which are sanctioned by the Word of God and the subordinate standards of this Church?

4. Do you acknowledge the Presbyterian government and discipline, as authorised in this Church, to be founded on, and agreeable to, the Word of God; do you promise to maintain, and submit to, the said government and discipline; and, while cherishing a spirit of brotherhood towards all the faithful followers of Christ, do you engage to seek the purity, edification, peace, and extension of this Church?

5. Are not zeal for the glory of God, and a desire to serve the Lord Jesus Christ, in the work of His kingdom, so far as you know your own heart, your great motives to enter into the office of ruling elder?

6. Do you adhere to your acceptance of the call to become ruling elder of this congregation, and do you engage in the strength of the grace of Jesus Christ, our Lord and Master, faithfully, diligently, and cheerfully to discharge all the duties of this office?

7. And these things you profess and promise through grace, as you would give in your account with joy at the coming of our Lord Jesus Christ with all His saints, and have an entrance administered to you abundantly into His everlasting kingdom?

FORMULA OF SUBSCRIPTION.

(To be subscribed by Probationers on receiving licence, and by all Ministers and Elders at the time of their Admission.)

I, , do hereby declare that, in the strength of the grace that is in Christ Jesus our Lord, I will constantly maintain and defend the doctrine, worship, and government of this Church, with the

liberty and exclusive spiritual jurisdiction thereof, as expressed in my answers to the questions put to me; and that I will fulfil, to the utmost of my power, all the obligations to which I have solemnly pledged myself.

PREAMBLE, QUESTIONS, AND FORMULA AT THE ORDINATION OF DEACONS.

PREAMBLE.

(*To be publicly read when the Questions are put.*)

It is hereby declared, that the following questions are put in view of Act 1648, approving of the Shorter Catechism; Act XII. 1846 of the Free Church of Scotland; Declaratory Act 1879 of the United Presbyterian Church; and Act XII. 1892, with relative Act of 1894, of the Free Church; and that Deacons are entitled to take advantage of any of these Acts.

QUESTIONS.

1. Do you believe the Scriptures of the Old and New Testaments to be the Word of God, and the only rule of faith and life?
2. Do you sincerely own and receive, as in accordance with Holy Scripture, the system of evangelical truth taught in this Church, and set forth in the Westminster Shorter Catechism?
3. Do you approve of the Presbyterian government and discipline of this Church; and are you persuaded that the civil magistrate has no jurisdiction or authoritative control over the regulation of the affairs of Christ's Church.
4. Do you accept of your call to the office of deacon in this congregation, and promise, through grace, faithfully, diligently, and cheerfully to discharge all the duties thereof?

FORMULA.

(*To be subscribed by Deacons at the time of their Admission.*)

I, , hereby declare that I sincerely own and receive, as in accordance with Holy Scripture, the system of evangelical truth taught in this Church, and set forth in the Shorter Catechism. I approve of the Presbyterian government and discipline of this Church. I am persuaded that the civil magistrate has no jurisdiction or authoritative control over the regulation of the affairs of Christ's Church; and I promise, through grace, to perform all the duties of the deaconship faithfully and cheerfully.

F.

LORD LOW'S JUDGMENT *IN CAUSA* REVEREND COLIN A. BANNATYNE AND OTHERS AGAINST TRUSTEES FOR THE UNITED FREE CHURCH OF SCOTLAND.

Edinburgh, 9th August 1901.—The Lord Ordinary having heard Counsel for the parties on the Closed Record and whole cause, and considered the same, dismisses the action, and decerns: Finds the pursuers liable in expenses; allows an account thereof to be given in, and remits the same when lodged to the Auditor to tax and report. A. Low.

OPINION.

In October 1900 the Free Church of Scotland and the United Presbyterian Church of Scotland united under the name of the United Free Church of Scotland. The pursuers represent a minority of the Free Church who objected to the Union, and refused to be parties to it on the ground that it could not be effected consistently with the standards and constitution of the Free Church.

The position taken up by the pursuers is that the ministers and members of the Free Church who refused to be parties to the Union now constitute the Free Church of Scotland, and in this action they claim that they are entitled to the means and estate of the Free Church, which at the date of the Union were held by trustees for behoof of the Free Church.

The Union was accomplished after many years of negotiation and after the procedure by which, according to the laws of the Church, "the more general opinion of the Church" is ascertained. Thus at the meeting of the General Assembly in May 1899, the "Union Committee" submitted a report embodying a "Plan of Union." The Assembly approved of the report, and adopted an overture enacting and ordaining that the Plan of Union "is authorised and accepted by this Church with the view to an incorporating Union with the United Presbyterian Church as a plan to come into operation as soon as a uniting Act shall have been passed by the General Assembly with consent of a majority of presbyteries of the Church." That overture was transmitted to the presbyteries of the Church for their opinion, and it was approved by them by a very large majority, and in the following May (1900) the General Assembly passed an Act in terms of the overture. The same Assembly sent another overture to the

presbyteries embodying an Act authorising a Union. That overture also obtained the approval of a large majority of the presbyteries, and at a meeting of the General Assembly held in October 1900 the Act was passed by a majority of 643 to 27. The procedure which I have narrated was taken in terms of what is called the Barrier Act. That was an Act which was originally passed by the Church of Scotland in 1697, and which was adopted by the Free Church. It provided that the General Assembly before passing any Act making an alteration or innovation either "in doctrine or worship or discipline or government" of the Church, should first lay before the Assembly an overture (that is, a proposal embodying the terms of the Act), which, if adopted by the Assembly, should be remitted to the consideration of the presbyteries, and if the result of the remit to the presbyteries was to show that the proposed Act was in accordance with "the more general opinion of the Church," then and not sooner the Assembly was authorised to pass it into law.

The Union therefore was effected in the most formal way, and it cannot be challenged unless it was a transaction which it was not in the power of the Church, acting by its General Assembly, to effect contrary to the wishes of a minority.

The case of the pursuers is that the Union was incompetent, 1st, because it involved a sacrifice of principles which formed a fundamental and essential part of the constitution of the Free Church; and 2ndly, because the Free Church could not unite with any other Church except with the consent of all her members.

The defenders on the other hand maintain that no fundamental or essential principle was violated by the Union, and that that being so, it was competent for the General Assembly to carry out the Union, acting by a majority of its members, after the sense of the Church had been taken in the manner provided by the Barrier Act. The defenders, however, further propounded a view which, if sound, would admit of a very easy determination of the question at issue. They argued that the constitution of the Church—its principles and doctrine—were whatever the General Assembly might declare them to be.

I am not prepared to assent to the latter argument. Large as the powers of the General Assembly of the Free Church, in my opinion, were, I do not think that they were unlimited. In the case of the Free Church (as in the case of every Church), there were certain doctrines and principles so essential that without them the Church would cease to exist. I do not think that the General Assembly could repudiate or materially alter such doctrines and principles. For example, the General Assembly could not, in my opinion, have competently passed an Act declaring that the Westminster Confession of Faith was no longer accepted by the Church, and enacting that the govern-

ment of the Church should in the future be Episcopalian and not Presbyterian, because that would have been to change the Church from being a Reformed Presbyterian Church into something very different.

On the other hand, in regard to matters which were not of the essential nature to which I have referred, I am of opinion that the General Assembly of the Free Church was supreme. The Free Church was framed as regards its judicatories—their powers, functions, and forms of procedure—upon the model of the Established Church of Scotland, and the General Assembly of the Established Church is a body which has not only judicial and executive but legislative powers. To go no further than the Barrier Act, which I have mentioned, its terms are instructive as showing the scope of the power of the General Assembly in the way of legislation. That Act speaks of Acts of Assemblies making "alterations or innovations . . . in either doctrine or worship or discipline or government," not for the purpose of restricting the powers of the General Assembly, but to secure by the procedure enacted that such alterations and innovations should not be sudden or to the prejudice of the Church. And indeed it was necessary that the Supreme Court and Council of the Church should have large powers of a legislative nature even in regard to matters of faith and doctrine. For example, the Established Church accepted the Westminster Confession as containing the sum and substance of the doctrine of the Reformed Churches. That Confession is a document which is open to interpretation, and which has been interpreted in different senses, with equal confidence, by different sects. Accordingly it was necessary that the Supreme Council of the Church should have the power, not only of deciding questions of doctrine which came before it judicially, but of declaring and enacting, as occasion required for the peace or welfare of the Church, what was the sense in which the Church interpreted particular passages in the Confession of Faith, or, in other words, what the doctrine of the Church was. I am accordingly of opinion that the Declaratory Act of 1892, in regard to which there was a great deal of argument, passed as it was after a reference to the presbyteries under the Barrier Act, was a legitimate exercise of the power belonging to the General Assembly of the Free Church, and that the pursuers' case is not well founded, in so far as it is rested on the averment that that Act was *ultra vires* of the Assembly.

The serious question seems to me to be whether it was not (to use the phraseology of the Claim, Declaration, and Protest of 1842) "an essential doctrine and fundamental principle in the constitution" of the Free Church, that it was (I now quote from the Protest of 1843) "the right and duty of the civil magistrate" (the State) "to maintain and support an establishment of religion in accordance with

God's Word"; and whether the Union with the United Presbyterian Church did not necessarily involve an abandonment of that principle?

There is no doubt that the founders of the Free Church when they left the Established Church in 1843 did so declaring that they adhered to the principle of an Established Church, and that they seceded only because as the law then stood the Church did not possess that independence in what they regarded as matters spiritual, which in their view was essential in order to give effect to the cardinal doctrine of the Headship of Christ.

On the other hand, it seems to me to be equally certain that the United Presbyterian Church never read the Confession of Faith as laying down that it is the right and duty of the civil magistrate to maintain and support an Established Church. There does not appear to be any material difference between the two Churches upon the point so far as their standards are concerned, but the view of the United Presbyterian Church as a whole has always been that it is not within the province of the civil magistrate to endow the Church out of public funds, and that the Church ought not to accept State aid, but ought to be maintained by the freewill offerings of its members.

I therefore think that it must be conceded that the original Free Church could not consistently with its avowed opinions have joined the United Presbyterian Church. The Establishment principle (to use a convenient short phrase) was one which was regarded as of great importance by the Free Church at the commencement of its history, and naturally so, because in the first place it justified the action of those who had seceded by proclaiming that they were not schismatics, and in the second place the founders of the Church hoped that a change in the law might be effected which would enable them to return to the Establishment. But seven-and-fifty years elapsed between the Disruption and the Union of 1900, and in the meantime the Free Church had grown and prospered as a voluntary church in fact. There was no longer any need to justify the position of the Church, because that was assured, and long prior to the Union, I take it, all hope or intention or desire of returning to the Established Church had passed away. The Establishment principle therefore had ceased to have the practical importance which it had in 1843, and the sense of the Church, as exhibited by large majorities in successive General Assemblies, was that the principle might be regarded as an open question, upon which the individual members of the Church might be guided by their own consciences.

It is therefore necessary to examine the place which the Establishment principle held in the constitution of the Free Church to see whether it was so essential that the majority of the Church, acting

through the General Assembly and the presbyteries, having taken a step which involved that the principle was no longer regarded as essential, but as a matter of opinion, the dissentient minority are entitled to have it declared that they are truly the Free Church, and are entitled to the civil rights belonging to the Free Church.

The leading document is the Claim, Declaration, and Protest which was adopted by the General Assembly of the Church of Scotland in 1842, setting forth the objections of the Church to the law as then existing, and as declared by the civil courts. An Address was also presented by the ministers and elders of the General Assembly to the Queen, submitting the Claim, Declaration, and Protest for her "favourable consideration," and expressing the hope "that such measures may be directed by your Majesty as will preserve to us the peaceable possession of those rights and privileges secured to us by statute and solemn treaty."

The Claim, Declaration, and Protest not having led to any change, or the prospect of any change, in the law, certain ministers and elders drew up a Protest, which they laid upon the table of the General Assembly in May 1843, and in terms thereof separated themselves from the Established Church and founded the Free Church. In the Protest they declared that the Claim, Declaration, and Protest of 1842 should be "holden as setting forth the true constitution of the Church." It is therefore to the Claim, Declaration, and Protest that we must turn to ascertain what is the constitution of the Free Church.

That document commences with the statement that it is an "essential doctrine of this Church, and a fundamental principle in its constitution" . . . "that there is no other Head of the Church but the Lord Jesus Christ," and that "the Lord Jesus, as King and Head of His Church, hath therein appointed a government in the hand of Church officers distinct from the civil magistrate." It is then set forth that "the above-mentioned essential doctrine and fundamental principle" had been recognised, ratified, and confirmed by repeated Acts of Parliament, but that the Patronage Act of Queen Anne, the interpretation put upon that Act by the Courts of Law, and the powers asserted by these courts, chiefly in regard to the settlement of ministers, amounted to a denial of the said doctrine and principle, by interposing the civil power between the Church and her Divine Head in matters which were truly spiritual and ecclesiastical. The document then claimed "as of right" that the Church should possess "her liberties, government, discipline, rights and privileges, according to law, especially for the defence of the spiritual liberties of her people," and protested that all Acts of Parliament and sentences of courts in contravention of the liberties and privileges of the Church were null and void. Finally, there was a prayer to Almighty God

"that He would be pleased to turn the hearts of the rulers of this kingdom to keep unbroken the faith pledged to this Church, . . . or otherwise that He would give strength to the Church—office-bearers and people—to endure resignedly the loss of the temporal benefits of an Establishment, and the personal sufferings and sacrifices to which they may be called, and would inspire them with zeal and energy to promote the advancement of His Son's kingdom, in whatever condition it may be His will to place them."

The claim, therefore, does not refer to the Establishment principle as an essential principle of the Church, but the principle is nevertheless affirmed, although in a parenthetical way, in the clause in which the essential doctrine and fundamental principle of the Headship of Christ is stated.

The parenthesis is in these terms: "while 'God, the supreme Lord and King of all the world, hath ordained civil magistrates to be under him over the people, for his own glory and the public good, and to this end hath armed them with the power of the sword' (ch. xxiii. sec. i.); and while 'it is the duty of people to pray for magistrates, to honour their persons, to pay them tribute and other dues, to obey their lawful commands, and to be subject to their authority for conscience' sake,' 'from which ecclesiastical persons are not exempted' (ch. xxiii. sec. 4); and while the magistrate hath authority, and it is his duty, in the exercise of that power which alone is committed to him, namely, 'the power of the sword,' or civil rule, as distinct from the 'power of the keys,' or spiritual authority, expressly denied to him, to take order for the preservation of purity, peace, and unity in the Church."

I shall have something to say presently in regard to the terms in which the principle is there stated, but, in the first place, I desire to say that the subordinate position which it holds in the Claim is not, in my judgment, to be taken as measuring the importance which the Church attached to it. The principle relates to the duty of the civil magistrate—the State—and not to the duty (at all events the direct duty) of the Church. If the civil magistrate refuses to recognise and support the Church, the fault is his, but the Church is free from blame. If, upon the other hand, the Church were to accept the recognition and support of the civil magistrate, subject to conditions which violated essential doctrines of the Protestant religion, she would be unfaithful, and under such circumstances her duty would be to separate her connection with the State. It was the latter view which it was the object of the Claim to enforce, and hence the parenthetical form in which the principle of the duty of the State or civil magistrate was referred to.

Nevertheless, it must be taken that the statement of the principle in

the Claim is a correct summary of the doctrine held by the Church in regard to the duty of the civil magistrate, and I shall now consider the terms in which it is framed.

The principle is stated in the form of three propositions, the first two being quotations from the Confession of Faith, and the third an adaptation of the language of the Confession.

The first proposition is, that civil magistrates are ordained by God for His own glory and the public good, and the second is, that it is the duty of people to pray for the magistrates, to pay them tribute, and to obey their lawful commands.

I do not suppose that any Protestant Church which accepts the Confession of Faith would take objection to these propositions.

The third proposition, however, is in a different position, and as it is an adaptation of Article 3 of Chapter XXIII. of the Confession, I shall take the exact words which I find there, a course to which the pursuers cannot object, as their view is that the Confession is unalterable. The article first declares that "the civil magistrate may not assume to himself administration of the Word and sacraments, or the power of the keys of the kingdom of heaven." It then proceeds (and this is the part referred to in the third proposition in the Claim); "yet he hath authority, and it is his duty, to take order that unity and peace be preserved in the Church, that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented and reformed, and all the ordinances of God duly settled, administered, and observed."

It is plain that that passage is open to construction, because many different views might be taken as to the method by which the civil magistrate ought to perform the duties ascribed to him. Let me take one example. It is laid down that the civil magistrate is "to take order . . . that the truth of God be kept pure and entire." To "take order" means, I apprehend, to use the magisterial power, or (as the Claim puts it) "the power of the sword." Then to keep "the truth of God pure and entire" seems to me to be equivalent to saying "to maintain sound doctrine." Is it, then, the right and duty of the magistrate to intervene with the power of the sword to maintain sound doctrine in the Church? The Free Church could not hold that view, because she left the Establishment on the ground that the civil magistrate had no right to interfere at all in spiritual matters. How the Free Church interpreted the third article of the chapter I do not know, nor do I know how the Established Church interpreted it prior to the Disruption, because I am not aware of any Act of Parliament, or Act of Assembly, or other constitutional document which defines the duty of the State to the Church, except the Westminster Confession.

I pass on now from the Claim to the Protest of 1843 and other authoritative documents of the Free Church, to see if we find in them any more precise statement of the principle than that which is contained in the Confession of Faith.

In the Protest the seceding ministers and elders protested that the Legislature having rejected the Claim, it was lawful for them to separate from the Establishment, "while firmly maintaining the right and duty of the civil magistrate to maintain and support an establishment of religion in accordance with God's Word."

That is the most precise statement of the principle which I find anywhere, and it must be taken as representing the sense in which the founders of the Free Church at that time interpreted the Confession of Faith. It does not, however, follow that that view was fixed and unchangeable, and could not be modified or reviewed by the Church so as to meet changed circumstances.

The next document to which I shall refer is an Act passed by the Assembly of the Free Church in 1846, in regard to the questions and formula to be put to office-bearers before ordination, and to candidates for the ministry. The Act proceeded upon the narrative that the change in the outward condition of the Church rendered it necessary to amend the questions and formula. It then approved of the questions annexed to the Act, and then proceeded: "And the General Assembly, in passing this Act, think it right to declare that while the Church firmly maintains the same scriptural principles as to the duties of nations and their rulers in reference to true religion and the Church of Christ for which she has hitherto contended, she disclaims intolerant or persecuting principles, and does not regard her Confession of Faith, or any portion thereof, when fairly interpreted, as favouring intolerance or persecution, or consider that her office-bearers, by subscribing it, profess any principles inconsistent with liberty of conscience, and the right of private judgment."

It will be observed that in the Act (as in the Claim and the Protest), the principle in regard to the duty of the civil magistrate is stated parenthetically, and that what is emphasised is the disclaimer of any interpretation of the Confession of Faith which would involve intolerant or persecuting principles, and the declaration that the office-bearers of the Church shall not be held, by subscribing the Confession, to profess (as regards the doctrine of the duty of the civil magistrate) any principles "inconsistent with the right of private judgment."

It seems to me that in face of that Act (providing as it does for so vital a matter as the profession of their faith to be made by entrants to the ministry), it is impossible to say that the Free Church regarded any particular method for the fulfilment by the civil magistrate of

his duty to the Church as an essential and fundamental doctrine of the Church.

Finally, I shall refer to an Act and Declaration which was issued by the General Assembly of the Free Church in 1851. It is in the form of a historical narrative, which was compiled by a committee of the General Assembly, and published for the information and instruction of the members of the Church. I find that it contains four passages which may be regarded as referring to the doctrine of the duty of the civil magistrate.

In the first place, it is stated that the Reformed Church of Scotland has ever held "that nations and their rulers are bound to own the truth of God and to advance the kingdom of His Son." I see no reason to suppose that the United Presbyterian Church would not all along have been ready to affirm that proposition.

In the second place, the Revolution Settlement is said to have "recognised as an unalienable part of the constitution of this country the establishment of the Presbyterian Church." That is a statement in regard to the effect of an Act of Parliament upon the constitution of the country, and not in regard to an article of faith on the part of the Church.

In the third place—referring to the Disruption—it is stated that the members of the Free Church seceded "under protest that it is her being Free, and not her being Established, that constitutes the real historical and hereditary identity of the Reformed National Church of Scotland." There (as in the Claim of 1842) spiritual independence is put forward as essential, while recognition of the State is regarded as a matter which (however important) does not affect the "identity" of the Church. That is not very consistent with the view now urged by the pursuers.

Finally, it is said that the Church "holds still, and through God's grace will ever hold, that it is the duty of civil rulers to recognise the truth of God, according to His Word, and to promote and support the kingdom of Christ, without assuming any jurisdiction in it or power over it." That again, I imagine, is a proposition to which the United Presbyterian Church would have assented, although they would probably have taken a different view from that generally held in the Free Church as to the way in which civil rulers should recognise the truth of God.

It therefore appears to me that as a matter of creed the Free Church simply accepted the statement of the Westminster Confession in regard to the duty of the civil magistrate, although as matter of opinion the founders of the Church gave their adhesion to the particular application of the duty to which effect had been given in Scotland. I have already pointed out that the Confession states the duty of the mag-

istrate in very general terms, which may be interpreted in different ways. I take it that the doctrine was so stated designedly, because the question how best the civil magistrate may perform his duty to the Church is necessarily one of circumstances. Now, in Scotland the State had recognised as the State Church, and had endowed, the Reformed Presbyterian Church, and the founders of the Free Church accepted, at the time of the Disruption, that recognition and endowment as being (so long as the State did not intervene in matters spiritual) a proper and sufficient carrying out by the State of the doctrine of the Confession. Until the Disruption, although there had been various secessions, the Established Church included a very large majority of those in the country who professed the Reformed Presbyterian faith. With the Disruption, however, there arose a Church—the Free Church—whose adherents were numerous and which was not in connection with the State. Then in 1847 two bodies, the Secession Church and the Relief Church, joined together and formed the United Presbyterian Church, which also came to be an important Church with numerous adherents. Thus in the latter part of the nineteenth century there were three large and important Presbyterian Churches in Scotland, one of which alone was recognised and supported by the State. That was an entirely different position of matters from that which had been in the contemplation of the founders of the Free Church when they declared their adherence to the form in which the State had discharged its duty to the Church in Scotland. There had come to be three Churches instead of practically only one Church, and it seems to me that it was competent for the Free Church, without sacrificing anything which was essential in her faith, doctrine, or constitution, to take the view that in the changed circumstances it was expedient that each Church should be maintained by the liberality of its members, rather than that the State should select one alone to be supported out of public funds.

And that was all that the Free Church required to do in order to bring her into line with the United Presbyterian Church. Apart from the Establishment principle there was no difference in doctrine or worship between the two Churches, and even as regarded that principle there does not seem to have been any practical difference, so far as the standards of the Churches were concerned, although there was undoubtedly at one time a difference in the views which were in general held by the members of the two Churches. Like the Free Church, the United Presbyterian Church accepted the Confession of Faith, including the XXIII. chapter, and, like the Free Church, she regarded the doctrine of the Headship of Christ as of supreme importance ; and she also, in 1879, passed a Declaratory Act in regard to formula, in which the view of the Church upon the "doctrine of

the civil magistrate" is stated in terms almost identical with the Declaratory Act of the Free Church of 1846, which I have already quoted.

I am therefore of opinion that the Union did not involve the giving up by the Free Church of any doctrine or principle which formed an essential or fundamental part of her creed or her constitution, but only involved the modification of views which the Church had held under different circumstances in regard to the application of the doctrine of the Confession as to the duty of the State—a modification which, it appears to me, it was entirely within the power of the General Assembly to make.

I have but one more remark to make upon this branch of the case, and that is, that the history of the Free Church, since the Disruption, shows that the particular form of the duty of the State to the Church, for which the pursuers contend, was not regarded as an essential matter. If the Establishment principle was an essential and fundamental doctrine of the Church, then it must be conceded that until that principle received practical effect, the Church was an imperfect and incomplete Church. As therefore the Free Church was from the beginning a Church of great zeal, and possessed of considerable power and influence, one would have expected to find it straining every nerve to bring about such an alteration in the law that it might—without sacrifice of principle—resume its connection with the State. But not a single act of that nature is averred, nor is any such act disclosed by the voluminous documents produced. On the contrary, the documents seem to me to show that the tendency of the Church was towards a permanent and avowed separation from the State; and further, I imagine it to be a matter of common knowledge, that if the views and efforts of the majority of the Free Church had been successful an Established Church would have ceased to exist in Scotland long prior to the Union.

For these reasons I am of opinion that the first ground upon which the pursuers claim the property held in trust for the Free Church fails.

The next question is whether, assuming that there was no obstacle in the way of difference in doctrine, the Union was incompetent so long as there was a dissentient minority?

Now the position of matters was this. There were two Churches identical in doctrine, worship, and form of government, and they were working together in the same field, so that their agencies overlapped and their efforts were to some extent wasted. It therefore seemed to both Churches that by uniting the common work in which they were both engaged would be greatly advanced. In such circumstances could it be said that a Union could not take place if a single member of the Free Church dissented? I do not think so. I think that the

power to effect such a Union could be maintained upon the general ground of the duty of unity among Christians, but it seems to me that it is sufficient to say that the Free Church from a very early period recognised and asserted that it had the power to unite with any other body of Christians holding the same faith. Thus immediately after the Disruption it became necessary to settle the terms under which the places of worship of the Free Church should be held, and in 1844 a Model Trust-Deed was prepared and approved of by the General Assembly. That Trust-Deed has been in use ever since, and the titles of nearly all the places of worship belonging to the Church are framed according to its terms. Under it the place of worship is vested in trustees "to be used as and for a place of religious worship by a congregation of the said body of Christians called the Free Church of Scotland, or of any united body of Christians composed of them and of such other body or bodies of Christians as the said Free Church of Scotland may at any time hereafter associate with themselves under the foresaid name of the Free Church of Scotland, or under whatever name or designation they may assume." These words contemplate the very case which has now occurred, and makes it plain that the Church all along asserted that she had power to make such a Union; and if she had that power, it seems to me to be absurd to say that she could only exercise it if there was absolute unanimity among her members.

I am therefore unable to give effect to the second ground upon which the pursuers claim the property held for the Free Church.

The pursuers claim alternatively that they have right to participate in the funds and property of the Free Church. Now it seems to me that either the pursuers are the Free Church of Scotland, and are therefore entitled to the whole funds and property held in trust for that Church, or they have entirely separated themselves from the Free Church, and have therefore no right to any part of its property. As my opinion is that the pursuers are not the Free Church of Scotland, it follows that I cannot hold them to be entitled to participate in the property of that Church.

I shall therefore dismiss the action.

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